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BRIEF FOR APPELLEE.

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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 410.

J. M. SCOTT, M. T. HOLLEY, SR., E. C. BEACH AND R. M. GARDNER, APPELLANTS,

vs.

JAMES DONALD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

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J. P. K. BRYAN,

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STATEMENT OF THE CASE.

The facts sufficiently appear in the "*Agreed Statement of Facts*" (fol. 78-84, pages 54-58, Transcript of Record) and the pleadings and decree in the Record.

FIRST ASSIGNMENT OF ERROR.

Because this suit is in effect a suit against the State of South Carolina, in violation of the Eleventh Amendment to the Constitution of the United States. (Folio 86, Record.)

It is sufficient to point out, in disposing of this alleged error, that this bill is not against the State of South Carolina, but in terms "against I. M. Scott, M. T. Holley, E. C. Beach and R. M. Gardner, and other *persons* claiming to act as constables, &c., under or by virtue of an Act of the general Assembly of the State of South Carolina, generally known as the "Dispensary Law." (Fol. 2, Record,) which Act is alleged in the bill to be in conflict with Article one, Section 8 and 9 of Constitution of the United States and unconstitutional, null *and* void. (Folio 5, Record.)

The bill is against *persons* claiming to act under pretence of authority of a void Act of the State Legislature. It seeks as relief a perpetual injunction against their wrongful acts which invade and threaten to continually invade the alleged right of complainants to import, own, use and consume ales, wines and liquors, the products of other States and foreign countries. It asks the Court to enjoin repeated seizures and trespasses, continually threatened. (Folio 9, 10, 11 Record.)

The bill does not ask that any State officer do any affirmative act. It only seeks protection against the illegal acts of persons claiming to act as State officers.

This Court has clearly and finally distinguished the two classes of cases as to what are and what are not suits against the State, and have declared that "suits against persons who hold office under the "State, for illegal acts done by them under color of an unconstitu-"tional law of the State are not suits against the State."

Pennoyer vs. McConnaughey, 140 U. S., 1.

This Court thus states the difference between the two classes in that case as follows:

"The first-class is where the suit is brought against the officers of the State, as representing the State's action and liability thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts, In re Ayers, 123 U. S., 443; Louisiana vs. Jumel, 107 U. S. 711; Antoni vs. Greenhow, 107 U. S. 769; Cunningham vs. Macon & Brunswick Railroad, 109 U. S. 446; Hagood vs. Southern, 117 U. S. 52.

"The other class is where a suit is brought against defendants who, claiming to act as officers, commit acts of wrong and injury to the right and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, *for an injunction to prevent such wrong and injury*, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not within the meaning of the Eleventh Amendment, an action against the State. Osborn vs. Bank of the United States, 9 Wheat. 738; Davis vs. Gray, 16 Wall. 203; Tomlinson vs. Branch, 15 Wall. 460; Litchfield vs. Webster County, 101 U. S. 773; Allen vs. Baltimore & Ohio Railroad, 114 U. S. 311; Board of Liquidation vs. McComb, 92 U. S. 531; Poindexter vs. Greenhow, 114 U. S. 270."

Pennoyer vs. McConnaughey 140 U. S. 1, 10.

And in granting the injunction in that case this Court further says:

"It must also be observed that the plaintiff is not seeking any affirmative relief against the State or any of its officers. He merely asks that an injunction may issue against them to restrain them from acting under a statute of the State alleged to be unconstitutional, which acts will be destructive of his rights and privileges, and will work irreparable damage and mischief to his property rights. We think it clearly demonstrated from the authorities above referred to that the relief prayed can be granted, if, as is contended for, the legislation of the State under which the defendants are assuming to act is unconstitutional."

Idem 140 U. S. 18, 19.

And having adjudged the State Statute unconstitutional the Court says:

"That statute being the one under which the appellants assumed to act affords them no security or immunity for the acts complained of, and it cannot be said, therefore, that this is a suit against the State, within the meaning of the Eleventh Amendment."

Idem. 140 U. S., 25.

In the light of these authorities it clearly appears that this suit is not a suit against the State of South Carolina.

SECOND ASSIGNMENT OF ERROR.

Because the Bill Presents no Question Arising Under the Constitution or Laws of the United States. (Fol. 86.)

It is sufficient to dispose of this assignment of error to refer to those parts of the bill in Equity showing the manufacture, sale and general use in South Carolina of intoxicating liquor as a beverage. Dispensary Law, Sec. 5, fol. 10, Record. Sec. 15, fol. 15, Record, and also showing the attempted importation, by complainants for their own use and consumption as a beverage, of the ales, wines and liquors, products of other States and foreign countries. (Fol. 3–4, Record,) and the repeated seizure of same by defendants, claiming to act as State constables, under authority of the said "Dispensary Law" of South Carolina, (fol. 5, Record,) and the following allegation of the bill contained in paragraph four thereof.

"IV. The plaintiff further alleges tha tthe seizing and carrying away forcibly of the said packages of liquor, as aforesaid, by the defendants was done without warrant or authority of law, but, on the contrary, under pretence of legal authority of an Act of the General Assembly of the State of South Carolina generally known as the "Dispensary Law," entitled "An Act to further declare the law in reference to and further regulate the use, sale, consumption, transportation and disposition of alcoholic liquids or liquors within the State of South Carolina, and to police the same," approved January 2, 1895, a copy of which is annexed as part of this bill, marked Exhibit "A," to which reference in full is prayed, which said Act, in its general tenor, scope and effect *and in so far as it attempts to abridge the right of this plaintiff*, and all others in like condition in the State of South Carolina, to import *into the State of South Carolina such liquors*, as aforesaid, (*i. e.*, products of other States) of the plaintiff for his own use, and to use and *consume in the State of South Carolina the same so imported*, is not an Act enacted in the lawful exercise of the police power of the State of South Carolina, and is a restriction and regulation of commerce between the States and foreign nations and discriminations in favor of the products of the State of South Carolina against the products of other States and countries, and is in conflict with Article 1, Sections 8 and 9 of the Constitution of the United States and the laws of Congress made thereunder, and is unconstitutional, null and void." (Fol. 62.)

We will discuss later the constitutionality of the "Dispensary Law" under other assignments of error. The "question arising

under the Constitution and laws of the United States," is, however, in the bill thus fully presented for decision of the Court, by these allegations and the Court below held them to be " Federal questions." (Fol. 46, Record.)

THIRD ASSIGNMENT OF ERROR.

Because the bill presents no case upon which the jurisdiction of a Court of Equity can be founded, as there are plain and adequate remedies at law, for the correction of any of the matters and things in the bill, even if the allegations are true. (Fol. 86.)

FOURTH ASSIGNMENT OF ERROR.

Because the Complainant has not, in and by his said bill, made or stated a case to entitle him in a Court of Equity to any relief against them, or either of them, as to the matters contained in the said bill or any of such matters. (Fol. 87.)

These two assignments of error, relating to the equity of the bill, we will discuss together.

The bill alleges specifically the attempted successive importations by complainant for his own use as a beverage, the ales, wines and liquors, products of other States, after written notice to defendants of his intention so to do, and that he would hold them responsible for seizure and trespass, by all remedies for his protection. That in defiance of his right they continued seizing all his imported packages, and even after repeated suits at law specifically set forth in the bill against them for heavy punitive damages, they continued to seize all such imported packages. The bill further alleges:

X. "And your orator further shows that, notwithstanding such notice and warning to the defendants, as aforesaid, of the invasion and violation of the said constitutional rights of your orator, and notwithstanding the said legal actions brought to redress the violation of and to vindicate the same, the said defendants and all others, constables of the State of South Carolina, have since continued to seize and carry away ales, beers, wines and spirituous liquors of your orator, and of all other persons in the State of South Carolina, imported from other States and foreign countries, and threaten to continue hereafter to seize all such wines, ales, beer and spirituous liquors which will be brought into this State by your orator, or any other

person, and further, threaten to enter forcibly the dwelling of your orator and there search the same for all such ales, beers, wines and spirituous liquors imported into this State by your orator, and there forcibly seize and thence carry away the same and confiscate the same, and generally threaten to hinder and prevent your orator and other persons in importing or bringing into this State for his own use and consumption ales, beers, wines and spirituous liquors, the product of other States and foreign countries, and to hinder and prevent your orator and other persons from holding, possessing, using and consuming the same so imported into this State. (Fol. 65.)

XI. "And your orator further shows that protection of your orator at law involves a multiplicity of suits against said constables under their repeated and continuous trespasses, and that by said Act of the General Assembly of South Carolina, known as the Dispensary Law, the remedy of replevin is denied your orator in the Courts of South Carolina for such seizures, (see Sec. 22 fol. 28, Record) and that all constables as aforesaid are wholly irresponsible financially and unable to respond to any judgment for damages against them, or either of them, and under their respective trespasses your orator's constitutional rights, privileges and immunities as aforesaid have been and are now being, and are threatened to be continually invaded and grossly violated without redress, and to the irreparable injury of your orator." (Fol. 66.)

Moreover, it is admitted by the agreed statement of fact (fol, 78-84 Record) that "Previous to filing of the bill and temporary injunc- "tion granted in this case the State constables seized, intended and "threatened to seize in future, all intoxicating liquors whatsoever "coming into the State from other States and foreign countries," and it is further admitted that "all the State constables who have made seizures are insolvent and financially irresponsible," except Holley, Chief Constable, who has made no seizures except the first of the eleven seizures enumerated. (Fol. 79-82, 84, Record.)

It further appears that "this order of temporary injunction was "granted after hearing and decision of the case at law by James Don- "ald, against these defendants, when the legal right as claimed in the "bill was adjudged, and the other cases at law still pending in this "Court, presenting the same question." (Fol. 52, Record.)

It also appears that the final decree of injunction was awarded on the 5th September, 1895, (fol. 85, Record,) after "in each of the three suits at law brought by plaintiff, James Donald, against defendants, final judgment for $300 had been given by the Court on 10th August, 1895, against the defendant." (Fol. 81, Record. Agreed, statement of facts.)

Under these allegations in the bill, the case stated and made is one of continuous, repeated and threatened invasion, violation and denial of constitutional commercial right, and further threatened seizures of property, and invasions of the complainant's dwellings, and the threatened continued prevention in future of the complainant's importation and use of intoxicating liquors, the products of other States and foreign countries, done by persons against whom successive suits had been instituted on the law side of the same Court, the United States Circuit Court, and who are alleged in the bill, and admitted to be wholly irresponsible and unable financially to respond to any judgment for damages. This is a case where money damages are no adequate compensation for denial of right to use as beverage the ales, beers, wines, etc., of other States, and where, if it were adequate compensation, there is no relief, both because of the multiplicity of suits, and the financial irresponsibility of the defendants.

It seems that no stronger case could be stated for the interposition of a Court of Equity. The cases are familiar that sustain the jurisdiction.

In the case of *Shelton vs. Platt, 139 U. S., 596*, this Court states the test of equity jurisdiction to be that the "trespass involved" must be "continuous, destructive, inflictive of injury incapable of being measured in money or committed by irresponsible persons."

And we have clearly stated and made a case involving at least three of these separate grounds, *i. e.*:

(1.) Continuous and threatened continuous trespass involving multiplicity of suits.

(2.) Injury incapable of being measured in money as the denial of right of commerce and use of products of other States as beverages.

(3.) Trespass committed by irresponsible persons, involving irreparable injury.

The protection of property of complainant and the common constitutional privilege of free commercial intercourse and use of products of other States is peculiarly for the Court of Equity, as stated by the U. S. Circuit Court of Louisiana:

"The sixteenth section of the Judiciary Act prohibits suits in equity when there is a plain, adequate and complete remedy at law. This prohibition is merely declaratory on the subject of legal remedy; it does not appear that the adoption of that statute has impaired the

jurisdictional powers of the Equity Courts of the United States for the protection of the *property* of individuals, or for protection of the *privileges* that belong as a *common right* to all persons to whom the Courts are open for the adminstration of justice."

Barthet vs. City of New Orleans, 24 Fed. R., 563.

Again this Court has said :

"Equity jurisdiction may be invoked, although there is also a remedy at law, unless the remedy at law, both in respect of the final relief and the mode of obtaining it is as efficient as the remedy which equity could confer under the same circumstances."

Kilbourn vs. Sunderland, 130 U. S., 505.

In this case at bar the legal remedy, suit at law, would result only in worthless judgments against financially irresponsible people.

Again in Texas and Pacific Railway Co. Interstate Tr. Co., 155 U. S., 585, against threatened tort to a railroad bridge by careless navigation of the river this Court held injunction would lie, because the public had an interest. Here also the right is a general and common one of commerce, and keeping open the highways of commerce for products of other States, in which the public are interested, under common constitutional privilege and right of citizens of United States.

Even in a case where the defendant U. S. marshal was solvent and able to respond in damages, this Court enjoining a levy of personalty said :

Watson vs. Sutherland. 5 Wall, 75, 78, 79.

"It is contended that the injunction should have been refused, because there was a complete remedy at law. If the remedy at law is sufficient, equity cannot give relief," but it is not enough that there is a remedy at law ; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its *prompt* administration, as the remedy in equity." How could Sutherland be compensated at law, for the injuries he would suffer, should the grievances of which he complains be consummated." * *

"Legal compensation refers solely to the injury done *to the property taken*, and not to any collateral or consequential damages, *resulting to the owner* by the trespass." * *

"The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case, must depend altogether upon the character of the case, as disclosed in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone fur-

nish relief, and that the ends of justice required the injunction to be issued."

And in the case at bar we ask what plain, adequate, prompt remedy at law have complainants against these continued wrongs? Where any remedy, if not in the Court of Equity, where alone he can defend himself against the threatened invasion of dwellings and seizures and denial of constitutional right, and where alone he can secure protection of his privilege under the constitution of United States against irreparable injuries at the hands of irresponsible defendants and against whom in a Court of law he must bring a multiplicity of suits resulting in worthless judgments.

In reply to suggestion of appellants that the State Dispensary Act gives a legal remedy, we reply (1) that the Act distinctly refuses a remedy of replevin of property and denies a suit for damages against the officer seizing it. (Sec. 22, Fol. 28, Record.)

But if it did give a remedy this would not affect the equity jurisdiction of the Court of the United States, as this Court has repeatedly decided.

"We observe, in confirmation of what has just been said, that the jurisdiction of the Courts of the United States is derived from the Constitution, and from legislation in conformity with it. The first limitation by the latter upon the jurisdiction of the equity Courts of the United States is, that no suit can be sustained in them, where a plain, adequate, and complete remedy may be had at law. The Court has said: 'It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficacious to the ends of justice, and its prompt administration, as the remedy in equity. (Boyce's Ex'x vs. Grundy, 3 Peters, 210; United States vs. Rowland, 4 Wh., 108; Osborn and the United States Bank, 9 Wh., 841, 842.) It is no objection to equity jurisdiction in the Courts of the United States, that there is a *remedy under the local law*, for the equity jurisdiction of the Federal Courts is the same in all States, and is not affected by the existence or non-existence of an equity jurisdiction in the State tribunals."

Barber vs. Barber, 21, How. 582, 591.

And more recently this Court has again announced the same doctrine, when it was contended that the legal remedy by ejectment was possible under State law and therefore, United States Circuit Court in equity had no jurisdiction. This Court said:

"The test of equity jurisdiction in the Courts of the United States—namely, the adequate remedy at law—is the remedy which existed when the Judiciary Act of 1789 was adopted, unless subse-

quently changed by Congress; and is not the existing remedy in a State or Territory by virtue of local legislation."

McConihay vs. Wright, 121, U. S., p. 201.

What this remedy and forum is, this Court has long ago declared.

"In case of controversy a Court of Equity is the proper tribunal to prevent an injurious act by a *public officer*, for which the law might give no adequate redress, or to avoid a multiplicity of suits."

Carrol vs. Safford, 3 How. 441, 463.

In every view of this case therefore, the Bill (and the evidence under it as appears in the agreed statement of fact) stated a case within the equitable jurisdiction of the United States Circuit Court. Not only this, but without the interposition of a Court of Equity and the aid of its preventive powers in this case the rights and privileges of complainants would be utterly and finally destroyed, the Constitution of the United States successfully disregarded, and nullified, and no other possible relief or redress could be invoked by the helpless citizen.

FIFTH ASSIGNMENT OF ERROR.

Because his Honor has Erred in Rendering a Decree for Perpetual Injunction against others than the Defendants Named in the Bill; and, Further, in Enjoining Perpetually those Officers from Seizing Ales, Wines and Liquors from others than the Complainant, James Donald. (Fol. 87.)

Our first answer to this assignment of error is that appellants took no such objection to the bill before answer, or at any time in the Court below and take their objection for the first time here in the appellate Court.

The bill is by "James Donald on his own behalf and on behalf of "all other persons in the State of South Carolina, importers for their "own use, and consumers of the wines, ales, beers and spirituous "liquors, products of other States and foreign countries." Fol. 59. There is no plea in abatement contesting the right of James Donald to sue as representative of this class; nor is there in the answer (Fol. 70-73) any objection set forth against his capacity so to sue on behalf of the class named.

And again as to the defendants; the bill is against J. M. Scott, M. T. Holley, Sr., E. C. Beach and R. M. Gardner, claiming to act as constables of the State of South Carolina, and all other persons claiming to act as such constables, etc., under the dispensary law of the State of South Carolina, which other persons, when their names are discovered, your orator prays may be made parties defendant to this bill." Folio 59. There was no plea or demurrer in abatement for multifariousness or misjoinder and no objection taken even in the answer as to joinder of the defendants. Fol. 70 to 74.

The prayer of the bill is an injunction against the defendants named and all other persons claiming to act as constables of the State of South Carolina, etc. Fol. 67. And the prayer of the bill also is for an injunction against such persons seizing, and searching for the ales, wines and liquors (products of other States) of the plaintiff, or any other person of the class named. Fol. 67. The injunction follows the structure and prayer of the bill and is directed against the defendants named, and all other such constables, etc., and enjoins them from seizing the liquors, products of other States, of the plaintiff. James Donald, or any other person of the class named, imported for his own use and consumption, etc. Fol. 51.

It appears, therefore, that the injunction granted by the Court was on behalf of the persons, and against the persons, originally described as parties in the structure of the bill. Following authorities clearly establish that the objection could only be taken by plea before answer, must be taken in the Court below and could not in any event be taken for the first time in this, the appellate Court.

"The 23rd rule of this Court for the regulation of equity practice in the Circuit Courts, is understood by the Court to apply to matters applicable to the merits, and not to mere pleas to the jurisdiction; and especially to those founded on any personal disability, or personal character of the party suing; or to any pleas, merely in abatement. The rule does not allow a defendant instead of filing a formal demurrer or a plea, to insist on any special matter in his answer; and have also the benefit thereof, as if he had pleaded the same matter, or had demurred to the bill. In this respect the rule is merely affirmative of the general rule of the Court of Chancery; in which matters in abatement, and to the jurisdiction, being preliminary in their nature, must be taken advantage of by the plea, and cannot be taken advantage of in a general answer; which necessarily admits the right and capacity of the party to sue."

Livingston v. Story, 11 Peters, 351, 352.

" The objection of multifariousness can be taken by a party to the bill only by demurrer or plea, or answer, and cannot be taken at the

hearing of the cause. The *objection cannot be taken by a party in the appellate Court.*

Oliver *et al*, v. Platt, 3 How. 333.
See also Barney v. Latham, 103 U. S. 215.

"An objection that the bill is multifarious must be made before answer, and can be tested only by the structure of the bill itself."

Nelson, *et al* v. Hill, *et al*, 5 How. 127.

No such objection having been taken by the plea, demurrer, answer or otherwise, and the question not having been made in any form before the lower Court, it cannot be urged here.

But even if the question was open in this Court it is clear that the bill, both as to the parties complainants and defendants is properly brought, and the injunction is properly awarded as to parties.

The class on behalf of whom the complainant sues, to wit: "importers for their own use and consumers of the ales, wines and liquors, products of other States and foreign countries," claim the right they set up as a general right of commerce under the Constitution of the United States. They are alleged to be "too numerous make parties complainants to this bill. (Fol. 60.) In the bill it is alleged that the defendants have seized, and threaten to seize, all such packages of liquors imported by complainant and other persons of this class. (Folio 66.) It also appears by the agreed statement of fact that imported liquors, products of other States, belonging to another of the class, one F. Sommers, also had been seized and confiscated in seven separate cases, set forth in fol. 82, and that for such seizures said F. Sommers had brought actions at law in the Circuit Court of the United States for the District of South Carolina, which were then pending. (Folio 83.) It also appears from the agreed statement of fact, (folio 84,) that the State constables seized, and intended to seize in the future, all intoxicating liquors, products of other States and foreign countries, imported by complainant and all of the class named, at the time this bill was filed. It thus appears that besides complainant other parties of the same class were being denied the same general right of importation of products of other States by the same officials, acting under color of the same law, and threaten to continue such trespasses as to all persons of the same class, to wit: "importers, for their own use, and consumers of ales, wines and liquors of other States and foreign countries."

These are facts on which this bill proceeds as to parties, and the following authorities support it:

The 48 Equity Rule of this Court as to parties too numerous specially provides "where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the Court *in its discretion* may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it."

And Equity rule 10 of this Court also particularly provides:

"Parties, how affected. Every person not being a party in any cause who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in any cause against whom obedience to any order of the Court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause."

These rules recognize the principle and practice of the Courts of Equity of the United States as founded on the English Chancery system and were made to fully carry them out.

In the decisions of this Court the same principles are declared.

In *Smith vs. Swormstedt*, 16 How., 302, 303, this Court said:

"The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest. Story's Eq. Pl., § 97, 98, 99, 103, 107, 110, 111, 116, 120; 2 Mitf. Pl., (Jer. Ed) 167, 2 Paige R. 19; 4 Mylne & Cr., 134, 619; 2 De Gex & Smale, 102, 122"

"Mr. Justice Story, in his valuable treatise on Equity Pleading, after discussing this subject with his usual research and fulness, arranges the exceptions to the general rule, as follows: 1. Where the question is one of a common or *general interest*, and one or more sue or defend for the benefit of the whole. 2. Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole; and 3. Where the parties are very numerous, and though they have or may have separate and distinct interests, yet it is impracticable to bring them all before the Court.

"In this latter class though the rights of the several persons may be separate and distinct, yet there must be a common interest or a *common right*, which the bill seeks to establish or enforce. As an illus-

tration, bills have been permitted to be brought by the lord of a manor against some of the tenants, and *vice versa*, by some of the tenants in behalf of themselves and the other tenants, to establish some right such as suit to a mill, or right of common, or to cut turf. So by a parson against some of the parishioners to establish a general right to tithes or conversely, by some of the parishioners in behalf of all to establish a parochial modus."

"In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest of right involved, so that it may be fully and honestly tried."

"Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a Court of Equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the Court. The legal and equitable rights and liabilities of all being before the Court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

16 Howard, pp. 302, 303.

And Judge Story, in West vs. Randall, 2 Mason, 193, 195, states the doctrine as follows :

"Nor are these the only cases, for, where the parties are very numerous, and the Court perceives that it will be almost impossible to bring them all before the Court, or where the question is of general interest, and a few may sue for the benefit of the whole." * * P. 193.

"There is one other class of cases, which I will just mention, where a lord of a manor has been permitted to sue a few of his tenants, or a few of the tenants have been permitted to sue the lord, upon a question of a right of common, or a parson has sued, or been sued, by some of his parishioners, in respect to the right of tithes. In these and analogous cases of *general right*, the Court dispense with having all the parties, who claim the *same right*, before it, from the manifest inconvenience, if not impossibility of doing it, and is satisfied

with bringing so many before it, as may be considered as fairly representing that right, and honestly contesting in behalf of the whole, and therefore binding, in a sense that right."

Idem, p. 195.

And Mr. Pomeroy, in his work on Equity Jurisprudence, Ed. 1881, Vol. 1, Sec. 269, thus sums up the doctrine:

"The jurisdiction, based upon the prevention of a multiplicity of suits, has long been extended to other cases of the third and fourth classes, which are not technically "bills of peace," but "are analogous to," or "within the principle of," such bills. Under the greatest diversity of circumstances, and the greatest variety of claims arising from *unauthorized public acts*, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American Courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no "common title," nor "community of right," or of "interest in the subject-matter," among these individuals, but where there is, and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. In a majority of the decided cases, this community of interest in the questions at issue, and in the kind of relief sought has originated from the fact that the separate claims of all the individuals composing the body arose by means of the same *unauthorized, unlawful, or illegal* act or proceeding. Even this external feature of unity, however, has not always existed, and is not deemed essential. Courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction, where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the *question at issue and in the remedy*. The same overwhelming weight of authority effectually disposes of the rule laid down by some Judges as a test, that Equity will never exercise its jurisdiction to prevent a multiplicity of suits, unless the plaintiff, or each of the plaintiffs, is himself the person who would necessarily and contrary to his own will be exposed to numerous actions or vexatious litigation. This position is opposed to the whole course of decision in suits of the third and fourth classes from the earliest period down to the present time. While the foregoing conclusions are supported by the great weight of judicial authority, they are, in my opinion, no less clearly sustained by principle."

To the same effect see *Story's Equity Pleading*, Tenth Edition, *1892, Section 95, p. 100, Sec. 96 p. 101* and cases cited. *Sec. 97 p. 102.* See also *Sec. 114*, and the case of *Bromley vs. Smith, 1 Sim. 8,* Judge Story sums up the result of the case as follows:

"§114. Upon the like grounds, a few of a large number of persons (as, for example, parishioners) have been permitted to institute a suit on behalf of themselves, and the rest, for relief against acts *done by Commissioners*, appointed *under an Act of Parliament*, which were injurious to their *common right*, although a majority of the parishioners approved of those Acts, and disproved of the suit. For, where a matter is necessarily injurious to the *common right*, the majority of the persons interested can neither excuse the wrong nor deprive all other parties of their remedy by suit."

See also Sec. 120, p. 124 as follows:

§120. "The third class of cases already alluded to as constituting an exception to the general rule, as to parties, is, where the parties are very numerous, and although they have, or may have, separate and distinct interests, yet it is impracticable to bring them all before the Court, and, on this account, they are dispensed with. In this class of cases there is usually a privity of interest between the parties; but *such a privity is not the foundation of the exception.* On the contrary, it is sustained in some cases, where no such privity exists. However, in all of them there always exists a *common interest*, or a *common right*, which the bill seeks *to establish and enforce*, or a *general claim or privilege, which it seeks to establish*, or to narrow, or take away. It is obvious, that under such circumstances, the interests of persons, not actual parties to the suit, may be in some measure affected by the decree, but the suit is, nevertheless, permitted to proceed without them, in order to prevent a total failure of justice. Indeed, in most, if not in all, cases of this sort, the decree obtained upon such a bill will ordinarily be held binding upon all other persons standing in the same predicament, the Court taking care that sufficient persons are before it, honestly, fairly, and fully, to ascertain and try the general right in contest. (And cases cited.)

See also Sec. 121, and particularly *Sections 124-125 pp. 128-9, 132-3, 134-5, Story's Equity Pleading*, and the cases there cited as to "Bills of Peace," from which it appears that wherever the bill is to establish a right, and that right be a *general right* in which many are interested, either as plaintiff or defendant, especially if it be claimed and resisted under Act of Parliament or public authority that the proper proceeding was a bill to establish the right on behalf of parties entitled to same and against parties resisting same.

So we submit here that the object of this bill is to establish the right of importation into the State of South Carolina and use and

consumption therein by such importers of the ales, wines and liquours, products of other States and foreign countries, and against the defendants, an official class, acting under color of the dispensary law of the State of South Carolina, in continuous violation of that right.

SIXTH ASSIGNMENT OF ERROR.

Because his Honor erred in holding, that the provisions of the Act of the General Assembly of South Carolina, approved 2nd day of January, 1895, commonly known as the Dispensary Law, forbidding a citizen of the State from importing ales, wines and liquors for his own use from other States or foreign countries, are not the lawful exercise of the police power of the State, and are in contravention of the Constitution of the United States and Inter-State Commerce Acts of Congress. Fol. 87.

SEVENTH ASSIGNMENT OF ERROR.

Because his Honor erred in holding, that the provision of the Dispensary Law forbidding a citizen to import alcoholic liquors for his own use and consumption, the products of other States, discriminates against the products of other States. Fol. 87.

EIGHTH ASSIGNMENT OF ERROR.

Because his Honor erred in holding, that the provision of the Act permitting the Chief Dispenser to purchase alcoholic liquors in other States and to import them into this State for use and consumption, and forbidding all other persons from so purchasing and importing for their individual use and consumption, discriminates against all other citizens of the State. Fol. 87.

NINTH ASSIGNMENT OF ERROR.

Because his Honor erred in holding, that the provision to the Dispensary Act makes a discrimination against all persons in the trade in other States who are not patronized by the State Dispenser, in that they are forbidden to seek customers within the State, and to enjoy a commercial intercourse secured to others in the State. Fol. 88.

TENTH ASSIGNMENT OF ERROR.

Because they submit, that the provisions of the Dispensary Law, forbidding citizens from importing into the State ales, wines and liquors from other States for their own use and consumption are the lawful exercise of the police power of the State, and are not in contravention to the Constitution of the United States, or of the Inter-State Commerce Acts of Congress, but are authorized by the same. Fol. 88.

These assignments (namely, the sixth, seventh, eighth, ninth and tenth,) involve the main question in this case, the constitutionality of the Dispensary Law of the State of South Carolina in prohibiting the importation into the State of South Carolina by citizens and residents therein for thhir own use and consumption the beers, ales, wines and liquors, the products of other States, which is the right asserted by the class on whose behalf this bill is brought.

The position of complainants on this question, as stated in the bill, as follows: that "said Act, in its general tenor, scope and effect, and in so far as it attempts to abridge the right of this plaintiff, (and of all others in like condition in the State of South Carolina,) to import into the State of South Carolina such liquors as aforesaid, of the plaintiff for his own use, and to use and consume in the State of South Carolina the same so imported, is not an Act enacted in the lawful exercise of the police power of the State of South Carolina, and is a restriction and regulation of commerce between the States and foreign nations, and discriminates in favor of the products of the State of South Carolina against the products of other States and countries, and is in conflict with Article 1, sections eight and nine of the Constitution of the United States, and is null and void." (Fol. 62.)

We contend that the complainants, citizens of the State of South Carolina, have the right to import for their own use and consumption from other States and foreign countries wines, ales, beers and spirituous liquors, and to hold and use and consume the same so imported, as long as the State of South Carolina is through her dispensaries selling as she is now selling, for use and consumption to all her citizens, throughout the whole borders of the State, also, beers, wines and spirituous liquors, and as long as the people of the State are actually and lawfully drinking intoxicating liquors as a beverage. That the Dispensary Law, in denying this right to the citizen, of importing for his own use wines, beers and liquors, is against the Constitution of the United States, and is a regulation and restriction of Inter-State and foreign trade and commerce, and is a discrimination against the products and industries of other States,

which the State is powerless to make or enforce, having surrendered that power to the United States, by joining with other States in the Constitution of the United States, which delegated to Congress the exclusive power to regulate commerce between the States, and that the principle here at stake preserves the free trade of South Carolina with her sister States as to her own products, which to lose would destroy the benefits of her membership of the commercial union formed under the Constitution. The enforcement of this right, alike the privilege and pledge of each and all of the States, and the very bond of this Union, is the object of this suit.

To understand the scope and effect of the Dispensary Law let us examine its main features:

SOUTH CAROLINA DISPENSARY LAW.

The title is "An Act to further declare the law in reference to and further regulate the use, sale, consumption, transportation and disposition of alcoholic liquors within the State of South Carolina, and to police the same." (Fol. 12.)

It prescribes "that the manufacture, sale, barter or exchange, receipt, acceptance, delivery, storing and keeping in possession, within this State of any spirituous, malt, vinous, fermented, brewed (whether lager or rice beer) or other liquors or any compound thereof, by whatever name called or known, which contains alcohol and is used as a beverage by any person, firm or corporation, the transportation, removal, the taking from the depot or other place by consignee or other person on the payment of freight or express or other charges by any person upon any such liquors, *except as hereinafter provided*, is hereby prohibited."

"All such liquors, *except* when bought from a State officer authorized to sell the same, or in possession of one, are declared to be contraband, and against the morals, good health and safety of the State, and may be seized wherever found, etc." (Sec. 1, 1895, fol. 12.)

By previous law of the State $50,000 was appropriated out of the State Treasury to conduct its business of buying and selling liquors by the State. (Act of 1892, Sec. 1.)

The Governor, Secretary of State and Comptroller General constitute ex-officio a State Board of Control to carry out provisions of the Act. (Sec. 2, 1895.) (Folio 13.)

They appoint the State Commissioners, "who is required to purchase all intoxicating liquors for lawful sale in this State and fur-

nish the same to such persons as may be designated as dispensers thereof to be sold as hereafter *provided* in this Act." (Sec. 3, f. 13.)

The State commissioner shall not sell to county dispensaries any intoxicating or fermented liquors except such as have been tested by the chemist of South Carolina College and his assistants provided in this Act and declared to be *pure*. (Sec. 3, fol. 13.)

The State commissioner deposits all amounts received by him from sales to county dispensaries or others with the State Treasurer and draws warrants on the State Treasurer for amounts necessary to pay the expenses incurred in conducting the business. (Sec. 3, folio 14.)

By former Act State commissioner was directed to sell to county dispensaries at a profit of not less than 50 per cent." (Act 1892.) "In all purchases of sales by commissioner a certificate must be attached to every package when shipped to commissioner from place of purchase, or shipped by him to County dispensaries, certified by his official seal, stating that the liquors contained in said package have been purchased by him for sale within the State of South Carolina, or to be shipped out of the State; under the laws of the State; and without such certificate any package containing liquors which shall be delivered to any consignee by any railroad or other common carrier, or be found in the possession of any common carrier, shall be regarded contraband, and may be seized and confiscated." (Sec. 3, f. 14.)

The State Commissioner is to make a monthly statement of all liquors sold by him, the different kinds and quality, the price paid, the terms of payment, and to whom sold, and names of parties from whom the liquor was purchased, and their places of business. (Sec. 4, fol. 15.)

The State Commissioner, before shipping the liquor to County dispensaries, shall cause the same to be put up into sealed packages of not less that one-half pint nor more than five gallons, in which packages they shall be sold by county dispensers. (Sec. 5, fol. 15.)

County boards of control are appointed by the State board of control. (Sec.6, fol· 15.)

And the county boards of control appoint the county dispensers for each county, and designate their place of business (Sec. 8) and issue permits to such county dispensaries "to keep and sell intoxicating liquors as in this Act provided." (Sec. 9, fol. 18.)

The county dispensers receive compensation as determined by state board.

" All profits, after paying all expenses of county dispensaries, shall be paid one-half to the county treasury and one-half to the municipal corporation where located. (Sec. 10, fol. 19.)

The county dispensary sells in packages of one pint to five gallons to all persons, except minors and drunkards. (Sec. 11, fol. 20.)

All persons resident in counties that elect to have no dispensaries are allowed to buy liquors from dispensaries in other counties, by shipments to their residences by county dispersaries. (Sec. 8, latter part, fol. 17-18.)

The manufacture of intoxicating liquor is not prohibited in the state; on the contrary, it is expressly permitted and encouraged.

" Any person, firm, association or corporation desiring or intending to manufacture or distill any liquors containing alcohol within this state shall first obtain from the state board of control a permit or license to do so." (Sec. 15, fol. 22.)

And it is further provided: " That manufacturers of distilled malt or vinous liquors who are doing business in the State shall be allowed to sell to no person in this State except the State Commissioner and to parties outside of the State, and the State Commissioner shall purchase his supplies from the brewers and distillers in this State when their product reaches the standard required by this Act; Provided, such supplies can be purchased as cheaply from such brewers and distillers in this State as elsewhere. (Sec. 15, fol. 23.)

Note.—The " standard required by this Act " is only that it be " pure." (Sec. 31. Fol. 32, and Sec. 3. Fol. 13.)

It is further provided: " That any person shall have the right to make wine for his own use from grapes or other fruits." (Sec. 15, fol. 23.)

It is further provided: " That the State Commissioner may enter into contracts with responsible grape growers in this State for the sale of domestic wines through the Dispensary, so as to encourage grape growing in this State, and in furtherance of this subject not more than 10 per cent. profit to the Dispensary over the expenses of bottling, labelling, freighting, etc., shall be charged for the handling of such wines." (Sec. 23, fol. 29.)

All liquors, except State dispensary liquors, are contraband, and may be seized and taken without warrant while in transit or after arrival.

(Sec. 25,) or wherever kept or stored, (Sec. 24.) and their possession is prohibited and declared unlawful, (Sec. 26) with the single exception "that liquors purchased outside of the State, owned and conveyed as personal baggage, shall be exempt from seizure when the quantity does not exceed one gallon." (Sec. 25, fol. 29–30.)

In case of seizure of contraband liquors "the State Commissioner shall have the same tested by the State chemist, and if *pure* shall sell the same through the State Dispensary as though purchased by him. If not pure he shall sell the same beyond the State and deposit the proceeds to the credit of the State Commissioner." (Sec. 31, fol. 32.)

It is further provided: "That it shall be unlawful for any person to take or solicit orders, or to receive money from other persons for the purchase or shipment of any alcoholic liquors for or to such other person in this State," etc. (Sec. 41, fol. 35.)

And that no person shall bring such liquors into this State, etc. "And any steamboat, sailing vessel, railroad, express company or other common carrier transporting or bringing into this State for sale or *use* any liquor, except by the Dispensary, shall suffer a penalty of five hundred dollars." (Sec. 33, fol. 33.)

And it is further provided: "That in no case shall an action lie against any officer or person acting under this Act for damages to person or property," and "all provisional remedies in civil actions" of the Code are suspended as against such officers. (Sec. 44, fol. 36.)

And it is further provided: "That no action or suit for recovery of contraband liquors be entertained in any Court of this State." (Sec. 26, fol. 30.)

It is further provided: "That all domestic wine is exempt from being contraband, and is not tested and requires no Dispensary seal." (Sec. 35, fol. 34.)

From the foregoing provisions of this dispensary law the principles of the Act are:

(1). The State of South Carolina has embarked in the liquor trade, with her own capital and her own officials as employees in "conducting the business." That intoxicating liquor is with her *an article of commerce*, bought and sold and good for man; and sold by her in any quantity in packages of one-half pint to five gallons.

(2). That in such trade she has assumed the exclusive monopoly and suffers no competition within her borders either from within or without, and would trade herself with Indian tribes and other States and foreign nations.

(3). That "the profits" of this trade are divided between the State, county and city governments.

(4). That her attitude by the law to the liquor question is that "pure intoxicating liquor" is good for the health, morals and safety of her citizens, and that she undertakes to provide and sell to them pure liquor in packages of one-half pint to five gallons for their use and consumption throughout the whole State; and even where a prohibition sentiment elected not to have dispensaries in certain counties, citizens there resident are supplied with liquor by the State from other county dispensaries by shipments made to them.

(5). That she allows all her liquor manufactories, breweries and distilleries to run as before, both to supply her own needs and ship without inspection their products to other States and foreign countries, giving to her liquor industries both the home and foreign market.

(6.) That she expressly enjoins her State Commissioner to buy his liquors for sale in this State from the distillers and brewers in this State, when their product reaches the standard prescribed, that is "pure," thus favoring and developing her own liquor industries and products to the disadvantage of the liquor industries and products of other States, where the product of both is "pure," and practically enacts a policy of "South Carolina liquor for South Carolinians."

(7.) That she expressly allows any person in the State to make wine, for their own use in the State without any inspection whatever, while seizing any wine imported into the State made out of the State for their own use. Again enacting "South Carolina made wine for South Carolinians," That she expressly exempts "domestic wine from being contraband, without seal of commissioner."

(8.) That for "the encouragement of grape growing within the State" she prescribes a scheme of "contracts with responsible grape growers in the State for sale of domestic wine through the dispensary so as to encourage grape growing in this State," and in furtherance of this object," makes a special low rate of profit, and at the same time while allowing no such arrangement with grape growers of other States and charging exorbitant prices for wines from other States (not less than fifty per cent. by former Act of 1892) fol. 84 she discriminates against wine from other States, and she even seizes as contraband all wines shipped from other States for use or consumption in this State at its normal price. Again enacting the policy "South Carolina wines for South Carolinians."

(9). While fixing by the Act itself "purity" as a mercantile standard and quality of intoxicating liquor good for the use of her citizens, she refuses inspection to liquors from other States, though equally pure, when imported from other States by citizens for their own use. And this, too, while her laws operate to make the liquor supply for use of its own citizens come from her own products to the exclusion of products of other States.

(10). While thus descriminating in favor of her own products and refusing inspection according to her own test, the State actually seizes all liquor from another State, and if upon her own test, it is found "pure," instead of returning it to the owner as having been found to be of the merchantable standard and quality fixed as lawful by the Act itself, the State persists in confiscating it, and even sells it to her own citizens through the dispensary, thus affirming its intrinsic good quality. The result of all of which is she practically prohibits the introduction of foreign liquors, while favoring the manufacturing of her own liquor products by her citizens and favoring their use and even their development within the State. And if it is found impure *she sells it* outside of the State, thus doing a business in other States in intoxicating liquors she herself has condemned as unfit for use.

(11). While fostering her own liquor industries and selling liquor to all her citizens, and the outside world, and foreign nations and Indian tribes, she excludes all the liquor products of sister States (by this discrimination) by a drastic system of penal laws and criminal statutes inflicting heavy penalties, against persons having such imported liquor, or carriers bringing it into the State, although it may be as pure as the liquor she herself sells.

On this statement of the purpose, object and result of the Dispensary Law, we announce two general legal propositions :

(1.) The Dispensary Law is not enacted in the lawful "exercise of the police power of the State," as to liquor imported for use and consumption by a citizen into the State.

(2.) The Dispensary Law discriminates against liquors of other States imported by a citizen of this State for his own use, and is null and void, and such liquors at no time became subject to the Dispensary Law, and will be protected by the United States wherever imported and wherever they exist in the State, whether before or after "arrival," under the commercial power of the United States Constitution.

At the outset, let us examine the effect of the Act of Congress known as the "Wilson Act," 1890. It is in these words :

WILSON ACT, CONGRESS, 1890.

"That all fermented, distilled or intoxicating liquors or liquids transported into any State or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in in such State or territory, be subject to the operation and effect of the laws of *such State* or territory *enacted in the exercise of its police powers*, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." 26 U. S. Statutes, 313.

The State Dispensary Act assumes to enact the Wilson bill, but the Dispensary Law substitutes "this law" for the words, "Laws of such State, enacted in the exercise of its police powers."

The words of the State Dispensary Law are:

"Sec. 32. That all fermented, distilled or other liquors or liquids containing alcohol transported into this State or remaining herein for use, sale, consumption, storage or other disposition, shall, upon introduction and arrival in this State, be subjected to the operation and effect *of this law* to the same extent and in the same manner as though such liquors or liquids had been produced in this State." Dispensary Act, Sec. 32, fol. 32, 33.

The assumption again in this section is that "*this law*" (the State Dispensary Law) with its gross discriminations against liquor products of other States, its denial of inspection, is a law enacted in the "exercise of the police power of the State," within the meaning of the Wilson bill. The Wilson bill declares that liquor is subject only to the laws of "such State, enacted in the exercise of its police powers," not to any law or every law of the State. It was enacted as a shield to allow the State to enforce prohibition (after Leisy vs. Hardin, 135 U. S., 100,) against the privilege of sale theretofore inhering in the original imported package, not as a sword to discriminate against products of sister States, and for the State to engage in a monopoly of the liquor traffic and protection of home products. It is a carefully guarded statute, and limits the State by its terms.

In *In Re Rahrer, 140 U. S., 545*, the Supreme Court by the Chief Justice, speaking for the Court has clearly stated that the effect of the Wilson Act was to subject imported articles to police power of the State before its sale as an imported package, and not to delay its operation until after its sale as an imported package. It only brought the original imported package within its police power "at an earlier period of time than would otherwise be the case." Idem 562.

In the language of this Court again "Congress did not use terms of permission to the State to act, but simply removed an impediment to enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted *no power to the State not then possessed*, but allowed imported property to fall at once upon arrival within the local jurisdiction." *In Re Rahrer, 140 U. S. 564.*

The Act did not enlarge the scope of the police power or turn over to the State absolute control of the liquor traffic; it only allowed, upon arrival, the operation of the laws of the State enacted in the "*Exercise of its police power.*" The question whether the given law of the State was a proper and lawful exercise of the police power was carefully left open by Congress to be determined in view of the definitions and limitations of the police power of the State in the previous decisions of this Court, for in the case of *In Re Rahrer* the Court quotes the cases of this Court bearing upon the relation of the police power to the commercial power and the Court expressly holds that this Act imparted '*no power to the State not then possessed.*'"

The questions therefore, are: (1.) Is the dispensary law a law "enacted in the exercise of the police power" within the meaning of the Act of Congress, and the decisions of this Court as to liquor imported into the State? (2.) Is the foreign liquor put upon the same plane as liquor produced in the State, as required by the Act of Congress, *i. e.*, is there any discrimination in the Dispensary Act against the liquor products of other States or foreign countries?

To sustain our position, we cite the following authorities. On the general principles this Court has said:

"There is no attempt to discriminate injuriously against the products of other States, or the rights of their citizens. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to these subjects and therefore void." Woodruff vs. Parham, 8 Wall, 140.

Where the burden on the products of other States was a tax, merely, this Court held:

"It is obvious that the right to impose any such discriminating tax, if it exists at all, cannot be limited in amount, and that a tax under the same authority can as readily be laid which would amount to an absolute prohibition to sell liquors introduced from without, while the privilege would remain unobstructed in regard to articles made in the State. If this can be done in reference to *liquors*, it can be done wih reference to *all the products if a sister State*, and in this

mode one State can establish a complete system of non-intercourse in her commercial relations with all other States of the Union." Hinson vs. Lott, 8 Wall, 150.

"But assuming the tax to be, as we have supposed, a discriminating tax, levied exclusively upon the products of sister States, and looking to the consequences which the exercise of this power may produce if it be once conceded, amounting, as we have seen, to a total abolition of all commercial intercourse between States, under the cloak of the taxing power, we are not prepared to admit that a State can exercise such a power, though Congress may have failed to act on the subject in any manner whatever." Hinson vs. Lott, 8 Wall, 151, 152.

"The tax in the case before us, if it were of the character we suggested, discriminating adversely to the products of all the other States, in favor of those of Alabama, and involving a principle which *might* lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation and be forbidden by the clause of the Constitution just mentioned." (8 Wall, 152.)

The burden here in case at bar is greater than a tax; it is exclusion of products of other States, in protection of local products, sold and consumed within the State.

Again the Court say: "It will not be denied that that portion of commerce with foreign countries and between the States, which consists in the transportation and exchange of commodities, is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the General Government was to insure this uniformity against discriminating State legislation." Welton vs. Missouri, 91 U. S., 280.

"It is sufficient to hold now that the *commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it even after it has entered the State from any burden imposed by* reason *of its foreign origin.* The act of Missouri encroaches upon this power in this respect, and is, therefore, in our judgment, unconstitutional and void." Welton vs. Missouri, 91 U. S., 282.

"In Woodruff vs. Parham, (8 Wall, 123,) and Hinson vs. Lott, (Id., 148,) it was held that a tax laid by a law of the State in such a manner as to discriminate unfavorably against goods which were the product or manufacture of another State was a regulation of commerce between the States forbidden by the Constitution of the United States. The doctrine is reasserted in the case of Welton vs. State of Missouri, *supra.* The Congress of the United States is

granted the power to regulate the commerce with foreign nations in precisely the same language as it is that among the States. If a tax assessed by a State injuriously discriminating against the products of a State of the Union is forbidden by the Constitution a similar tax against goods imported from a foreign State is equally forbidden." Cook vs. Pennsylvania, 97 U. S., 573.

In 100 U. S. 439, this Court has again fully stated the principle and the reason of it as the basis of our commercial union.

"Upon the same ground in the more recent case of Welton vs. State of Missouri, (91 U. S., 275,) we hold void a statute of Missouri imposing a pedler's license tax upon persons going from place to place to sell patent and other medicines, goods, wares or merchandise, except books, charts, maps and stationery, not the growth, product or manufacture of that State, and which did not impose a like tax upon the sale of similar articles, the growth, product or manufacture of Missouri."

"In view of these and other decisions of this Court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein or the transportation thereto, of the products of other States more onerous public burdens or taxes than it imposes upon the like products of its own territory."

"If this were not so it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to the citizens of the several States be materially abridged and impaired. 'Over whatever other interests of the country,' said Mr. Webster, 'this government may diffuse its benefits and blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the necessities of commerce, and for its immediate object the relief of those necessities, by removing their causes, and by establishing a uniform and steady system.' But State legislation such as that indicated in the cases which have been cited, if maintained by this Court, would ultimately bring our commerce to that 'oppressed and degraded state' existing at the adoption of the present Constitution, when the helpless, inadequate confederation was abandoned and a national government instituted, with full power over the entire subject of commerce, except that wholly internal to the State composing the Union." Guy vs. Baltimore, 100 U. S., 439-440.

And again in Guy vs. Baltimore, 100 U. S., 443, this Court say:

"In the exercise of its police powers a State *may exclude from its territory*, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, *are prejudicial to the health or* which would endanger the lives or property of its people. But if the State, *under guise of exerting its police powers*, should make *such exclusion or prohibition applicable solely to articles* of *that kind, that may* be *produced* or *manufactured in other States*, the Courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States."

"The power of the national government over commerce with foreign nations and among the several States is broad and comprehensive. It reaches *the interior of every State of the Union, so far as it may be necessary* to *protect the products of other States* and countries from discrimination by reason of their foreign origin." Brown vs. Maryland, 12 Wheat. 419. *Guy vs. Baltimore, 100 U. S., 443.*

Again this Court expound the principle as follows:

"Here there is a clear discrimination in favor of home manufacturers against the manufacturers of other States. Sales by manufacturers are chiefly affected through agents. A tax upon their agent, when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the State, it is to that extent a regulation of commerce in the articles between the States. It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale.

"If by reason of their foreign character the State can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign articles and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several States." Webber vs. Virginia, 103 U. S., 350.

"There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens and against the products and citizens of other States." County of Mobile vs. Kimball, 102 U. S., 691–697. Webber vs. Virginia, 103 U. S., 351.

In Robbins vs. Shelby Tax Dist., 120 U. S., 493, this Court, among other things, fixes the limit of the police power in inspection laws: "It is also an established principle, as already indicated, that the *only way* in which commerce between the States can be *legitimately affected* by State laws, is when, *by virtue of its police power*, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries and other commercial facilities; *the passage of inspection laws to secure the due quality and measure of products and commodities*; the passage of laws *to regulate or restrict the sale of* articles deemed injurious to the health and morals of the community; the imposition of taxes upon persons residing within the State or belonging to its population, and avocations and employments pursued therein, not directly connected with foreign or Inter-State commerce or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein. But in making internal regulations a State cannot impose taxes upon persons passing through the State, or coming into it merely for temporary purpose, especially if connected with Inter-State or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad, or from another State, and not yet become a part of the common mass of property therein; and *no discriminations* can be made, by any such regulations, adversely to the *persons or property of other States*; and no regulations can be made directly affecting Inter-State commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject." *Robbins vs. Shelby Tax Dist., 120 U. S., 493-4.* In this case it is settled that inspection laws as part of the police power, is for the purpose "of securing the *due quality* and measure of products and commodities."

"Can the *State legislation* make it a Tennessee privilege to carry on the business of *importing goods* from *foreign countries?* If not, has it any better right to make it a *State privilege* to carry on Inter-State commerce? It seems to be forgotten, in argument, that the people of this country are *citizens of the United States*, as well as of individual States, and that they have some *rights under the Constitution and laws* of the former independent of the latter, and free from any interference or restraint from them." (120 U. S., 496.)

"When goods are sent from one State to another for sale, or in consequence of a sale, they become part of the general property, and amenable to its laws; provided, that no discrimination be made

against them as goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are. (Brown vs. Houston, *qua supra ; Machine Co. vs. Gage, 100 U. S., 676 ; 120 U. S., 497.*

And passing again on the scope of inspection laws as a part of the police power, this Court say in 125 U. S. 488, 489.

"It is impossible to justify this statute of Iowa by classifying it as an inspection law. The right of the States to pass inspection laws is expressly recognized in Art. 1, Sec. 10, of the Constitution, in the clause declaring that 'no State shall, without the consent of Congress, lay any imports or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.' * * * 'And all laws shall be subject to the revision and control of the Congress.' The nature and character of the inspection laws of the State, contemplated by this provision of the Constitution, were very fully exhibited in the case of Turner vs. Maryland, 107 U. S. 38. 'The object of inspection laws,' said Chief Justice Marshall in Gibbons vs. Ogden, 9 Wheat, 1, 203, 'is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject, before it becomes an article of foreign commerce among the States, and they prepare it for that purpose.' They are confined to such particulars as, in the estimation of the Legislature and according to the customs of trade, are deemed necessary to fit *the inspected articles for the market*, by giving to the purchaser public assurance that the article is in that condition, and of *that quality*, which *makes it merchantable* and fit for *use or consumption*. They *are not founded on the idea that* the things, in respect to *which inspection is required*, are *dangerous or noxious in themselves*. As was said in Turner vs. Maryland, 107 U. S. 38, 55: 'Recognized elements of inspection laws have always been—*quality of the article*, form, capacity, dimensions and weight of package, mode of putting up, and making and branding of various kinds—all these matters being supervised by a *public officer* having authority *to pass or not pass* the article as lawful merchandise, as it did or did not answer the *prescribed requirements*. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should coexist in order to make a valid inspection law. *Quality alone* may be the subject of inspection, without other requirement, or the inspection may be made to extend to all the above matters.' It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse." Bowman vs. Chicago, 125 U. S., 488, 489.

Under this expounding of an *inspection law* under the Constitution

of the United States, when once the State has fixed the merchantable quality of liquor, as it has done in the dispensary law, and made the test simply that it is "*pure*," so soon as the liquor was by the public officer found to answer the prescribed requirement (purity) it should be passed as lawful merchandise. But even if found "*pure*," the State Dispensary Law confiscates the imported liquor, to sell again to its own customers.

Again in Bowman vs. Chicago, 125 U. S. 490, this Court fixes clearly the limit of the police power.

"And here is the limit between the sovereign power of the State and the Federal power. That is to say, that which does not belong *to commerce* is within the jurisdiction of the *police power* of the State, and that which does belong to *commerce* is within the jurisdiction of *the United States*."

The State of South Carolina, however, in this Dispensary Act monopolizes the trade and *keeps intoxicating liquor in commerce* and at the same time would usurp the jurisdiction of the United States to regulate that commerce.

And this Court say further:

"The same process of legislation and reasoning adopted by the State and its Courts could bring within the *police power* any article *of consumption* that a State might wish to exclude, whether it belonged to that which was drunk or to food and clothing.

Bowman vs. Chicago, 125 U. S., 491.

"It may not under the cover of exerting its police powers substantially prohibit or burden either foreign or interstate commerce. * * * The reach of the Statute was far beyond its professed object and far into the realm which is within the exclusive jurisdiction of Congress. * * * The *police power* of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise, and under color of it, *objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution.* And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the Courts to guard vigilantly against any needless intrusion."

Bowman vs. Chicago, 125 U. S., 491, 492.

"But whatever may be the nature and reach of the police power of the State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade

the domain of the national government. * * * Neither the unlimited powers of a State to tax, nor any of its large police powers can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution." Bowman vs. Chicago, 125 U. S., 492, 493.

"In Brown vs. Houston, 114 U. S., 622, 630, it was declared that the power of Congress over commerce among the States is certainly so far exclusive that *no State* has power to make any law or regulation which *will affect the free and unrestrained* intercourse and trade between the States as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or *products of other States* coming or brought within its jurisdiction." (Bowman vs. Chicago, 125 U. S., 495.)

As denying the police power as an authority for the act, the Court said, as if in anticipation of just such legislation as this Dispensary Act:

"If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include *tobacco* or any other articles, the *use or abuse* of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its *own agriculture*, manufactures or arts of any description, and prevent the introduction and sale within its limits of any one or all articles that it may select as coming into competition with those it seeks to protect. The *police power* of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution of Congress have intended to limit the freedom of commercial intercourse among the people of the several States." Bowman vs. Chicago, 125 U. S., 494.

And again, in 135 U. S., 113, this Court puts the matter very clearly:

"That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of Courts, is not denied."

" What does not belong to commerce is within the jurisdiction of the police powers of the State, but that which does belong to commerce is within the jurisdiction of the United States; that to extend the *police power* over subjects of *commerce* would be to make commerce subordinate to that power, and would enable the State to bring within the *police power* any article of consumption that a State might wish to exclude, whether it belonged to that which was drunk or to food and clothing. 135 U. S., 113, 114.

The universality of the principle governing all the States and all their products as commercial commodities is thus declared by this Court:

"The same rule applies to the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Washington, the tobacco of Maryland and Connecticut or the products, natural or manufactured, of any State, applies to all commodities in which a right of traffic exists, recognized by the laws of Congress, the decisions of Courts and usages of the commercial world." Lyng v. Mich. 135, U. S., 167.

In reply to the position of appellants that this Act is declared by its bill to be an exercise of the police power, and the presumption is that it was enacted in good faith by the State we have but to refer to the repeated decisions of this Court, among them more particularly *Minnesota v, Barber, 136 U. S.* 319-320, and Brennan v. Titusville, 153 U. S., p. 299 to show that the title of an Act and even the decision of State Supreme Courts does not control this Court in its decision of this question. In the first case the Court said:

"The presumption that this statute was enacted in good faith for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, *cannot control* the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose on the part of the Legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation be destructive of rights granted or secured by the Constitution. In such cases the Courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this Court. In Henderson, &c. vs. New York, &c., 92 U. S. 259, 268, where a statute of New York was held to be unconstitutional and void as a regulation of such commerce, the Court said that "in whatever language a statute may be framed, its purpose must be determined by its natural and reason-

able effect. In People vs. Campagnie Generale Transatlantique, 107 U. S. 59, 63, where the question was as to the validity of a statute of the same State, which was attempted to be supported as an inspection law authorized by Section 10 of Article 1 of the Constitution, and was so designated in its title, it was said: "A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease and to cure the sick, an inspection law within the constitutional meaning of that word, by calling it so in the title." So in Soon Hing vs. Crowley, 113 U. S. 703, 710. "The rule is general with reference to the enactments of all legislative bodies, that the Courts cannot inquire into the motives of the Legislature in passing them, except as they might be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purpose they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments." In Mugler vs. Kansas, 123 U. S., 623, 661, the Court, after observing that every possible presumption is to be indulged in favor of the validity of a statute, said that the judiciary must obey the Constitution rather that the law-making department of the government, and must, upon its own responsibility, determine whether, in any particular case, the limits of the Constitution have been passed. It was added:

"If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relations to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution. Upon the authority of those cases, and others that could be cited, it is our duty to inquire in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether, by its necessary or natural operation, it impairs or destroys rights secured by the Constitution of the United States," Minnesota vs. Barber, 136 U. S., 320.

The words of the Court in that case referring to the necessary exclusion by the Act of sound meats of other States, applies with equal force to the necessary exclusion of pure liquors, products of other States, in case at bar.

"The enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease.

A careful examination of the Minnesota Act will place this construction of it beyond question." (136 U. S., 321.)

"As the inspection must take place within the twenty-four hours immediately before the slaughtering, the Act, by its necessary operation, excludes from the Minnesota market, practically all fresh beef, veal, mutton, lamb or pork—in whatever form, and although entirely sound, healthy, and fit for human food—taken from the animals slaughtered in other States; and directly tends to restrict the slaughteriug of animals, whose meat is to be sold in Minnesota for human food, to those engaged in such business in that State. (136 U. S., 322.)

"When to this is added the fact that the statute, by its necessary operation, prohibits the sale in the State of fresh beef, veal, mutton, lamb, pork, from animals that may have been inspected carefully and thoroughly in *the State* where they *were slaughtered*, and before they were slaughtered, no doubt can remain as to the effect upon commerce among the several States. It will not do to say—certainly no judicial tribunal can with propriety, assume—that the people of Minnesota may not, with *due regard* to their health, rely upon *inspection in other States of animals* there slaughtered for purposes of human food. If the object of the statute had been to deny altogether to the citizens of other States the privilege of selling within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb or pork, from animals slaughtered outside that State, and to compel the people of Minnesota, wishing to buy meats, either to purchase those taken from animals inspected and slaughtered in the State or to incur the cost of purchasing them when desired for their own domestic use at points beyond the State, that object is attained by the Act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business among the several States, it would be difficult to enact legislation that would have that result." (Idem 136 U. S., 322, 323.)

In the case at bar, not only is the duly inspected liquor of other States seized as contraband, but it is also denied inspection altogether, and seized and confiscated even if it is of the merchantable standard, *i. e.*, pure, fixed by the State as the test of merchantable quality in her own sales to all her citizens.

"In Welton vs. Missouri, 91 U. S., 275, 281, the Court speaking by Mr. Justice Field, declared to be unconstitutional a statute of Missouri, imposing a license tax upon the sale by peddlers of certain kinds of personal property 'not the growth, produce or manufacture

of that State, but which did not impose a like tax upon similar articles grown, produced or manufactured in Missouri. After observing that if the tax there in question could be imposed at all, the power of the State could not be controlled, however unreasonable and oppressive its action, the Court said: 'Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation, favorable to the interests of one State, and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States.'" (136 U. S., 324.)

"In Railroad Co. vs. Husen, 95 U. S., 465, the Court examined a statute of Missouri prohibiting, under penalties, any Texas, Mexican or Indian cattle from being driven or otherwise conveyed into, or remaining in, any county of the State, between the first day of March and the first day of November in each year, by any person or persons whatsoever. While admitting in the broadest terms the power of a State to pass sanitary and laws for the protection of life, liberty, health or property within its borders, to prevent convicts, or persons and animals suffering under contagious or infectious diseases, from entering the State, and, for purposes of protection, to establish quarantine and inspections, the Court, Mr Justice Strong delivering its opinion, said that a State may not, '*under the cover of exerting its police powers, substantially prohibit or burden either foreign or Inter-State Commerce.*' The general ground upon which it held the Missouri statute to be unconstitutional was that its effect was to 'obstruct Inter-State Commerce, and to discriminate between the property of citizens of one State and that of citizens of other States.'" 136 U. S. 324, 325.

"The latest case in this Court upon the subject of Inter-State commerce, as affected by local enactments discriminating against the products and citizens of other States is Walling vs. Michigan, 116 U. S. 446, 455. We there held to be unconstitutional a statute of Michigan imposing a license tax upon persons not residing or having their principal place of business in that State, but whose business was that of selling or soliciting the sale of intoxicating liquors to be shipped into the State from places without, a similar tax not being imposed in respect to the sale and soliciting for sale of liquors manufactured in Michigan. Mr. Justice Bradley, delivering the opinion of the Court said: 'A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is in effect a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.' 136 U. S. 325.

And this Court there announce the privilege and right of the complainants in the case at bar in these words:

"The people of Minnesota have as much right to protection against the enactments of that State interfering with the freedom of commerce among the States as have the people of other States. Although this statute is not avowedly, or in terms, directed against bringing into Minnesota of the products of other States, its necessary effect is to burden or obstruct commerce with other States, as involved in the transportation into that State, for purposes of sale there, of all fresh beef, veal, mutton, lamb or pork, however *free from disease* may have been the animals from which it was taken." Minn. vs. Barber, 136 U. S., 326.

So the citizens of South Carolina, complainants here, have as much right to protection against the enactments of that State inhibiting the importation for their own use of the liquors of other States, however free from adulteration and however *pure* they may be.

Further expounding the right of the citizen to have in an inspection law a test to which he can reasonably conform this Court say in that case in comment on the case of Patterson vs. Kentucky, 97 U. S., 501:

"The Kentucky statute prescribed no test of inspection which, in view of the nature of the property, was either unusual or unreasonable, or which by its necessary operation discriminated against any particular oil because of the locality of its production. *If it had prescribed a mode of inspection to which citizens of other States*, having oils designed for illuminating purposes, and which they desired to sell in the Kentucky market, *could not have reasonably conformed, it would undoubtedly have been held to be an unauthorized burden upon interstate commerce.* Looking at the nature of the property to which the Kentucky statute had reference, there was no difficulty in the way of the patentee of the particular oil there in question submitting to the required local inspection." 136 U. S., 328.

And the Court continues:

"But a law providing for the inspection of animals whose meats are designed for human food *cannot be regarded as a rightful exertion of the police powers of the State*, if the inspection prescribed is of such character, or is burdened with such conditions, as will prevent altogether the introduction into the State of *sound meats*, the product of animals slaughtered in other States. It is one thing for a State to exclude from its limits cattle, sheep or swine actually diseased, or meats that, by reason of their condition or the condition of the animals from which they are taken, are

unfit for human food, and punish all sales of such animals or of such meats within the limits. It is quite a different thing for a State to declare, as does Minnesota by the necessary operation of its statute, that fresh beef, veal, mutton, lamb, or pork—articles that are used in every part of this country to support human life—shall not be sold at all for human food within its limits, unless the animal from which such meats are taken is inspected in that State, or, as is practically said, unless the animal is slaughtered in that State." (136 U. S., 328,)

"One other suggestion by the Counsel for the State serves to be examined. It is that so far as this statute is concerned, the people of Minnesota can purchase in other States fresh beef, veal, mutton, lamb or pork, and bring such meats into Minnesota for their personal use. We do not perceive that this view strengthens the case for the State, for it ignores the right which the people of other States have in commerce between those States and the State of Minnesota. And it ignores the right of the people of Minnesota to bring into that State, for purposes of sale, sound and healthy meat, wherever such meat may have come into existence." (136 U. S. 328, 329.)

"If the statute, while permitting the sale of meats from animals slaughtered, inspected and 'certified' in that State, had expressly forbidden the introduction from other States, and their sale in Minnesota, of all fresh meats, of every kind, without making any distinction between these that were from animals inspected on the hoof and those that were not inspected, its unconstitutionality could not have been doubted. And yet it is so framed that this precise result is attained as to all sales in Minnesota for human food, of meats from animals slaughtered in other States." (136 U. S., 329.)

"In the opinion of this Court the statute in question, so far as its provisions require, as a condition of sales in Minnesota of fresh beef, veal, mutton, lamb or pork for human food, that the animals from which such meats are taken shall have been inspected in Minnesota before being slaughtered, is in violation of the Constitution of the United States and void." (136 U. S., 329, 330.)

In the light of these principles, so fully elaborated in this opinion, the denial of the right of importation for personal use, and denial of inspection of such liquors and seizure and confiscation of all such liquors, when the State herself is selling pure liquor to all her citizens, stands out as a bold usurpation of the power to regulate commerce, inhering in the Federal government.

Again this Court affirmed the principle of *Minnesota vs. Barber*, and uncovered the vice of this class of legislation in *Brimmer vs. Rebman*, 138 U. S., 81.

" The recital in the preamble that unwholesome meats were being offered for sale in Virginia cannot conclude the question of the conformity of the Act to the Constitution. 'There may be no purpose,' this Court has said, 'upon the part of the Legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may by its necessary operation, be destructive of rights granted and secured by the Constitution;' in which case, 'the Courts must sustain the supreme law of the land by declaring the statute unconstitutional and void.' Minnesota vs. Barber, 136 U. S., 313, 319, and authorities there cited. Is the statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the Constitution? This question admits of but one answer. The statute is, in effect, a prohibition upon the sale in Virginia of beef, veal or mutton, *although entirely wholesome*, if from animals slaughtered one hundred miles or more from the place of sale." (Brimmer vs. Rebman, 138 U. S., 81.)

"Whether there shall be inspection or not and whether the seller shall compensate the inspector or not, is thus made to depend entirely upon the place where the animals from which the beef, veal or mutton is taken were slaughtered. Undoubtedly a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress or infringe rights granted or secured by that instrument. But it may, not under the *guise of exerting its police powers or of enacting inspection laws*, make discriminations against the products and industries of some of the States in favor of the products and industries of some of its own or other States. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon the terms of equality with owners of like meats from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which in terms or by its necessary operation, denies this in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and, therefore, void. (Welton v. Missouri, 91 U. S., 175, 281; Railroad Company v. Husen, 95 U. S., 465; Minnesota v. Barber, above cited.) The fees exacted under the Virginia statute for the inspection of beef, veal and mutton, the products of animals slaughtered one hundred miles or more from the place of sale, are, in reality, a tax; and, therefore, a discriminating tax imposed by a State, operating to the disadvantage of the products of other States when introduced into the first mentioned State, is in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the powers conferred by the Constitution upon the

Congress of the United States." (*Brimmer v. Rebman, 138 U. S. 82.*)

"If the object of Virginia had been to obstruct the bringing into that State for use, as human food, of all beef, veal and mutton, *however wholesome*, from animals slaughtered in distant States, that object will be accomplished if the statute before us be enforced." Brimmer vs. Rebman, 138 U. S., 83.

"It is for all practical ends, a statute to prevent the citizens of distant States, having for sale fresh meats (beef, veal or mutton,) from coming into competition upon terms of equality with local dealers in Virginia. As such, its repugnancy to the Constitution is manifest. The case, in principle, is not distinguishable from Minnesota vs. Barber, where an inspection statute of Minnesota relating to fresh beef, veal, mutton, lamb and pork offered for sale in that State, was held to be a regulation of inter-state commerce and void, because by its necessary operation it excluded from the markets of that State practically all such meats, in whatever form, and although *entirely sound* and fit for human food, from animals slaughtered in other States." Brimmer vs. Rebman, 138 U. S., 83.

"We are of opinion that the statutes of Virginia, although enacted to protect its people against the sale of unwholesome meats, has no real or substantial relation to such an object, but by its necessary operation is a regulation of commerce, beyond the power of the State to establish." Brimmer vs. Redman, 138 U. S., 84.

So in the case at Bar the "local dealer" is the State with a monopoly of the liquor traffic, and the operation of the State statute is the prevention of all ales, wines, beers and liquors, products of other States, however *pure* they may be, coming in competition with the local products and the State monopoly, and though the South Carolina statute proceeds on the theory that the State must furnish and sell *pure* liquor to her citizens and protect them against *impure* liquors, it has, in the language of this case, "no real or substantial "relation to such an object, but by its necessary operation is a regu- "lation of commerce beyond the power of the State to establish."

And this Court in Wright vs. Wright, 141 U. S., 66, again affirm the principle that an inspection law of a State must be one for all the products of all the States, and must apply to all alike, and say:

"The law in question is a discriminating law and required the inspection of flour brought from other States, when such inspection is not required for flour manufactured in Virginia. This aspect of the case brings it directly within the principle, Brimmer vs. Rebman, 138 U. S., 78, decided at the present term."

And the Court quote again the language of Mr. Justice Harlan,

delivering the opinion of the Court in that case: "Undoubtedly, a State may establish regulations for the protection of its people against the sale of *unwholesome* meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress or infringe upon rights granted or secured by that instrument. But it may not under the *guise of exerting its police powers, or of enacting inspecting laws,* make discriminations against the products and industries of the States in favor of the products and industries of its own or of other States. Any local regulation which in terms or by its necessary operation, denies this equality in the markets of the State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and, therefore, void. Welton vs. Missouri, 91 U. S., 275, 281; Railroad Company vs. Husen, 95 U. S., 465; Minnesota vs. Barber, 136 U. S., 313, 319. The case of Brimmer vs. Rebman was decided in accordance with these views, the law in question being held to be unconstitutional and void. The decision in that case is so directly opposite to the present that it is unnecessary to prolong the discussion or to cite further authorities." Wright vs. Wright, 141 U. S., 66.

And in Walling vs. Michigan, 116 U. S., 459, 460, the Court applied the same principle to *intoxicating liquors*, products of other States, Judge Bradley saying:

"That this must give an immense advantage to the products manufactured in Michigan, and to the manufacturers and dealers of that State, is perfectly manifest."

"It is suggested by the learned Judge who delivered the opinion of the Supreme Court of Michigan in this case that the tax imposed by the Act of 1875 is an exercise by the Legislature of Michigan of the *police power* of the State for the discouragement of the use of *intoxicating liquors*, and the preservation of the health and the morals of the people. This would be perfect justification of the Act if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the perogatives of the National Legislature. The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States Government created thereby. New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650; Walling vs. Michigan, 116 U. S., 459, 460."

And in *Brennan vs. Titusville 153 U. S. 299*, the Court by *Mr. Justice Brewer* says:

"Even if the license in terms been declared to be exacted as a *police regulation*, that would not conclude this question, for whatever be the reason given to justify, or the power invoked to sustain the Act of the State, if that Act is one which trenches directly upon that which is within the executive jurisdiction of the National Government, it cannot be sustained. In New Orleans Gas Co. vs. Louisiana

Light Co., 115 U. S., 650, 661, this Court, by Mr. Justice Harlan, said: 'Definitions of police power must, however, be taken subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the General Government, or rights granted or secured by the supreme law of the land.'

And re-affirming the cases above quoted, the Court say:

"That no definition of the police power, and no urgency for its use can authorize a State to exercise it in regard to a subject matter which has been confided exclusively to the discretion of Congress by the Constitution." "The police power of the State cannot obstruct foreign commerce or Inter-State Commerce beyond the necessity for its exercise; and under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution (95 U. S. 473, 474.")

And the Court distinguished "between that which is mere inspection and the legitimate exercise of the police power, and that which, under guise of inspection is a direct burden upon and obstruction to Inter-State Commerce." Brennen vs. Titusville, 153 U. S. 301.

And in *Plumley v. Mass, 155 U. S. 471* the Court again re-affirms this position and quotes with approval the case of *Walling v. Michigan*, supra, 116 U. S. 459.

And in the still later case of *Emmert v. Missouri, 156 U. S. 296*, the cases are all reviewed, the same principles are fully elaborated and illustrated.

It was under the controlling force of these decisions of this Court that the Circuit Court acted in awarding the injunction for the clear reasons given in the opinion of the Court set out at fol. 44-48, pages 36-39 of the Record.

In conclusion we would urge upon the Court to consider the magnitude and far-reaching consequences of the principles here at stake.

The author of this Dispensary Law, (Governor Tillman) thus announces the *new* political theory on which it is based:

"Perhaps no measure passed by any legislature in any State within the memory of man has excited such widespread comment and elicited such deep interest. This is mainly owing to the fact that it is an *entirely new idea from an American standpoint*, and deals with the question of controlling the liquor traffic in a *new way*." Message of Governor Tillman to the General Assembly of South Carolina, House Journal, 1893, p. 35.

"It is safe to say that no member of the General Assembly, and very few others, certainly not myself, ever conceived of the magnitude of the undertaking." Idem p. 36.

"A pure article is guaranteed and the consumer obtains honest measure and standard strength." p. 39.

"The law rests upon the idea that it is the proper thing to supply what the *people want* for their legitimate use." Idem p. 46.

"*If men will have it (intoxicating liquor) the State should supply it.*" *Idem p. 46.*

It is not difficult to locate the school of political thought that announces as a new principle in our form of government that *the State should supply what the people want.*

In one aspect it concerns only the State and her functions of civil government; for if the State can, in the exercise of the police power, herself monopolize, and with the taxes of the people, and through her own official employees, conduct a trade in intoxicating beverages sold to all her citizens and consumed by all her citizens as good for their health and morals, then the State may also, under the exercise of the police power, monopolize and officially conduct a trade in all articles which are capable of adulteration in the manufacture or abuse in the use, and the State could lawfully, in the exercise or under the guise or pretext of the police power, add to the usual system of existing regulations and restraints of trade, (which is the normal exercise of the police power,) another system of engaging in or of exclusive monopoly of buying and selling by the State itself of all these articles, and we may have, constitutionally, exclusively conducted by the State, through its officers and agents, with the public funds and absorbing the revenue, the following trades: The State fertilizer dispensary, the State tobacco dispensary, the State butter dispensary, the State fresh meat dispensary, the State salt meat dispensary, the State drug dispensary, the State fruit dispensary, the State flour dispensary, and so on through every trade in which in the exercise of the police power the State could make regulations, and thus practically the whole business, trade and commerce of the

State could be constitutionally turned into a system of official conduct of business, with an army of officers and State agents; and thus instead of the individual citizen conducting trade with private capital and private enterprise, under the protection and restraints and regulations of the Government, the State would be conducting trade with public funds through official employees. To state this result is to demonstrate the falsity of the principle, for this result is simply Socialism and Paternalism and Communism and destroys the very purposes and transgresses all the bounds of "*civil* government" in the history of the Anglo-Saxon race, and as contemplated by the founders of these American commonwealths.

For the Government to seize on a trade and monopolize it is an invasion of the right of the citizen.
Say's Political Economy, p. 103.

The character of sovereign and trader is inconsistent.
Adam Smith's Wealth of Nations, 3 Vol., 357.

See particularly *State vs Beebe, 6 Ind., 501; Rippe vs. Becker*, 57 N. W. Rep., 33; Supreme Court, Minn., 1894; Slaughter House Cases, 16 Wall., 61, 62, in which cases it was declared that the police power, as understood in American Constitutional law, means simply the power of the State to impose those restraints upon private rights which are necessary for the general welfare of all; and the police power of the State to regulate business does not include power to engage in or to carry it on.

And these cases were followed and principles declared by the State of South Carolina, in the cases of *McCullough vs. Brown, 41 S. C. Rep., 220, 1893*. But in a political revolution of South Carolina, after a reconstruction of the Supreme Bench of the State of South Carolina, in the case of the *State vs. Aiken, 42 S. C. Rep., 222, 1894*, the Supreme Court of South Carolina reversed the former decision and declared, following the absolute and monarchical systems of Continental Europe, that the State, in the exercise of the police power, could usurp and conduct a trade.

All of this new and startling policy for an American State in one aspect concerns the State alone, and is to be measured by her own Constitution and the policy of her own laws.

But in another and broader sense the far reaching consequences of the question and magnitude of the principle at stake does not stop with the State alone. Indeed it affects this whole country, for this is a commercial union as well as a political union of American States, and the bond of commerce is under the Constitution of the United States the practical, substantial, and enduring bond of

this union. And if the State of South Carolina could lawfully enact and enforce against the citizens and products of other States her existing dispensary law, and exclude the pure products of other States and prevent the importation for their own use and consumption by the citizens and residents of South Carolina of such pure beer, ales, wines and liquors, the products of other States and foreign countries, and deny them inspection according to her test and standard while the State is herself, through an official monoply, selling the like products of her own State to all her citizens—in short if the will and privilege of the citizen of the United States to import and drink as a beverage, as he may please, any of the liqnors, products of other States and foreign countries of equal quality and purity, is denied, then on the same principle the State of South Carolina, or any other State of these United States, could enact a State Dispensary law to assume the trade in any article capable of adulteration in the manufacture, and of abuse in the use, and there would be possible throughout the several States of the United States such institutions as the State liquor dispensary, State butter dispensary, State meat dispensary, State tobacco dispensary, State oil dispensary, State flour dispensary, etc., and by which all these and other trades, in short, practically the whole business of the country, would be monopolized by the State, selling to her own citizens her own products, and such products of other States as she may choose or not to import, or selling none of the products of other States, and excluding from the State all the products of other States of equal merchantable quality, when imported by by her own citizens for use and consumption, althongh she is selling at the same time to her citizens and her citizens are using as fit for consumption the identical goods of same merchantable standard or quality.

To state this inevitable result is simply to reveal the magnitude of the question here involved and to show that such a principle generally embodied into law would result in the commercial anarchy of these States and destroy the very bond of commercial union of the States of the United States. It is peculiarly the function of this Court to vigilantly guard the constitutional rights, privileges and immunities of the citizens of the United States here invoked by complainants as equal sharers in the benefits of this commercial union of all these States.

J. P. K. BRYAN,
Counsel for Appellee James Donald.

NOTE.—This brief is also submitted in No. 311, 312 and 313 as argument for Defendant in error James Donald against the constitutionality of the "Dispensary Law" of South Carolina on the sole exception therein involving this question.

J. P. K. BRYAN.
Counsel for James Donald Defendant in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 410.

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BRIEF FOR APPELLANTS IN REPLY.

WM. A. BARBER,
Attorney General, for Appellants.

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BRIEF FOR APPELLANTS IN REPLY.

In the brief for appellee there are some statements and arguments to which we desire to file a brief in reply.

Our views as to his discussion of the first and second assignments of error are fully set forth in the brief for appellants already filed.

In considering the third and fourth assignments of error together, at page 10 of his brief, counsel for appellee says: "In reply to suggestion of appellants that the State dispensary act gives a legal remedy, we reply (1) that the act dis-

tinctly refuses a remedy of replevin of property and denies a suit for damages against the officer seizing it," and section 22 of the act is cited. With this we take issue. An action for damages for detention of liquors is prohibited, but process to recover property and liquors seized is denied only in cases arising under section 22. The attention of the Court is asked to that section (Transcript, folios 26 *et seq.*). It will be observed that it relates to the means of suppressing liquor resorts as common nuisances, and it is only the liquors and vessels containing them, found upon search of such establishments, that are not subject to process for recovery. Surely the appellee would not contend that this affects him as one *desiring to import for personal use.* The provision is: "Liquors seized, as hereinbefore provided, and the vessels containing them shall not be taken from the custody of the officers in possession of the same by any writ of replevin or other process while the proceedings herein provided are pending." The proceedings therein provided for are proceedings for an injunction against the maintenance of the common nuisance which was held a valid exercise of equitable jurisdiction in the case of Eilenbecker *vs.* Plymouth County, 134 U. S., 31. It is true section 44 of the dispensary act (Transcript, folio 36) provides that provisional remedies under the South Carolina code shall not apply against seizures under the act, but this does not deny the right to ordinary suit of replevin which may be brought by any person whose goods are seized under any section other than section 22, relating to common nuisances.

Discussing the fifth assignment of error (Brief for Appellee, page 11), he says: "Our first answer to this assignment of error is that appellants took no such objection to the bill before answer or at any time in the Court below and take their objection for the first time here in the Appellate Court." Our simple reply is that the objection was taken in the Circuit Court. From the inception of this proceeding we have contended that the Court could do nothing more than grant

individual relief, and that the complainant could not sue to protect alleged rights of the general public.

This position was not specifically taken in the return to rule to show cause (Transcript, folio 41 *et seq.*), because in the original bill the prayer for temporary injunction was as follows:

"Wherefore your orator prays the Court to now grant him a temporary writ of injunction restraining and enjoining the said defendants and all other persons, as aforesaid, claiming to act under the said dispensary law of the State of South Carolina, from seizing or attempting to seize, in transit or otherwise, or entering the dwelling of your orator to search, seize, and carry away or confiscate any ales, beers, wines, or spirituous liquors imported into the State of South Carolina by your orator for his own use and consumption, or in any manner whatsoever hindering and preventing your orator from importing, holding, possessing, using, and consuming the said liquors as imported as aforesaid."

It will be observed, then, that the complainant asked a temporary injunction that would give him individual relief only. But his honor the circuit judge in granting the order of temporary injunction exceeded the scope of the prayer in the bill and enjoined the defendants and all other officers of the State of South Carolina "from seizing or attempting to seize, in transit or otherwise, both before and after arrival in the State of South Carolina and at any place in the State of South Carolina, take, carry away, or confiscate any packages whatsoever of ales, wines, beers, or spirituous liquors or any intoxicating liquors, the products of other States or foreign countries, imported into or brought into the State of South Carolina, by any means of transportation whatsoever, by the complainant, James Donald, or any other person whomsoever, for his own use and consumption," and from searching the premises of complainant or any other person in the State of South Carolina or any other place whatsoever within the State for such liquors so

imported by the complainant or any other person for his use or consumption, etc. (See Transcript of Record, folio 51.)

This order of temporary injunction was made on the 8th day of May, 1895. By reference to the Transcript of Record, page 43, it will be observed that his honor the circuit judge, on the 26th day of June, 1895, granted leave to the complainant to amend his bill by the insertion of such words as would conform it in scope to the temporary order of injunction already granted. A copy of the amended bill of complaint is set out in the Record, folios 59 and following. This amended bill was lodged on the 26th of June, 1895.

In fact, the complainant amended his bill in consequence of the objection being taken by counsel for the defendants in some interventions in the cause, subsequent to the granting of the temporary injunction. The very positions which we are now urging were then presented to the Circuit Court.

But we submit that the objection was also raised in the pleadings in the cause. Whether considered in the nature of an objection for multifariousness, misjoinder, or otherwise, we respectfully submit that it was sufficiently raised. The answer of the defendants (Transcript, folio 70 and following) is in the nature of a "demurrer, plea, and answer." The first paragraph thereof is as follows:

"The defendants, M. T. Holley, Sr., J. M. Scott, R. M. Gardner, and E. C. Beach, now and at all times hereafter saving and reserving to themselves all and all manner of benefit or advantage or exception or otherwise that can or may be had or taken to the many issues, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering, submit to this honorable Court that the complainant has not in his bill shown any case in equity or case entitling him to proceed against them in this honorable Court, and pray all such benefit as if they had demurred to the bill, and they further interpose a plea to the jurisdiction of the Court."

So we made the general objection "that the complainant has not in his bill shown any case in equity, *or case entitling him to proceed against them*," and prayed all such benefit as if the defendants had demurred to the bill. We take it that this practice is permitted under rule 39.

If the objection be considered one that might have been taken by separate demurrer, still it is sufficient, for, while the cause is generally stated, the complainant might have objected and had the grounds specified (*Taylor vs. Holmes, 14 Fed. Reporter, 498*). This he failed to do and now seems to have entirely forgotten that the objection was made in the Court below.

However, if we regard the proper objection as being upon the ground of multifariousness, we submit that it might be raised by the Court *sua sponte* and considered at any time.

Now as to the merits of the objection. The learned counsel for complainant says "that the class on behalf of whom the complainant sues are importers, for their own use and consumers, of ales, wines, and liquors, the products of other States and foreign countries." He files this bill as the representative of this alleged class and assumes to sue as their representative. This procedure is attempted to be sustained by a series of cases decided by this Court and the English Courts, in which it was held that where a numerous class have general rights or the same right common to all one or more of the class may maintain a bill on behalf of himself or themselves and of the others, and a bill may also be maintained against a portion of a numerous body of defendants representing a common interest. As we conceive it, such cases are where the class, either plaintiff or defendant, can be designated or determined, either numerically or otherwise, by some contract, agreement, or personal relation and where the suit involves some property right growing out of such contract, agreement, or personal relation. This differs widely from the case at bar. We cannot con-

ceive how extensive the class may be on behalf of whom the complainant is suing. It would seem to extend to the whole citizenship of South Carolina, or at least to any citizen of the State who may now or ever hereafter want a drink and object to purchasing it through the dispensary. This is not such a class as can maintain an action through a representative. It is capable of no designation and knows no limit save the human appetite. Their alleged rights do not arise under any contract, agreement, or personal relation. In fact, the bill filed is in the nature of a creditor's bill, and the complainant stands as one seeking to enforce public, *purely* public, rights. Therein lies the distinction between the case at bar and the line of decisions cited by counsel for complainant. In the one it is a purely public right that is involved, while in the other the right is a general or common right of a limited class.

"An injunction will not be granted on the application of a private person to protect purely public rights." (Beach on Inj., sec. 13; Springer *vs.* Walters, 139 Ill., 419.)

In appellee's brief the sixth, seventh, eighth, ninth, and tenth assignments of error are discussed together as involving the main question in the case. Our views as to the line of distinction between the commercial power of the Union and the police power of the State are fully given in the brief already filed, but we desire to notice some positions taken by counsel for appellee.

On page 21 of his brief he says:

"By former act State commissioner was directed to sell to county dispensaries at a profit of not less than 50 per cent."

It is true that the act of 1892, which established the system and appropriated $50,000 for its support, did make such provision for profits, but it has since been repealed, as appears from the act now under consideration, and no prac-

tical question based on the former profit feature can now arise.

On page 23, discussing the provisions of the act, he says:

"And it is further provided, 'That all domestic wine is exempt from being contraband and is not tested and requires no dispensary seal.'"

The statement is correct so long as the wine remains in the hands of and is consumed by the party making it. The law has always permitted grape-growers to make wine for their own use; but should they seek to sell it through the dispensary it must undergo analysis and be stamped just as other wines.

He announces a number of principles as underlying the act, some of which are correct and some, we submit, are erroneous. They are as follows:

(1.) "The State of South Carolina has embarked in the liquor trade, with her own capital and her own officials as employés in 'conducting the business;' that intoxicating liquor is with her an article of commerce, bought and sold and good for man, and sold by her in any quantity in packages of one-half pint to five gallons."

The State of South Carolina has embarked not "in the liquor trade," as stated, but in an effort to minimize the evils of liquor-drinking. She does not hold intoxicating liquor "good for man," but says that those of her citizens who will buy liquor shall have only pure liquors that have been tested by the State chemist and sold under strict police surveillance.

(2.) "That in such trade she has assumed the exclusive monopoly and suffers no competition within her borders, either from within or without, and would trade herself with Indian tribes and other States and foreign nations."

The State has assumed direct control of the liquor traffic, but it is in no sense a monopoly in restraint of trade. (*See*

decision of Judge Simonton in Lowenstein vs. Evans et al., 69 Fed. Rep., 908.)

(3.) "That 'the profits' of this trade are divided between the State, county, and city governments."

There is no provision in the act stipulating "profits." If any are made, it is incidentally, and then they are divided between the State, county, and municipal corporations. A portion is given the county and municipality to aid in supporting their police regulations. That portion which goes to the State is, under the new constitution of South Carolina, appropriated to public-school purposes. (See constitution of South Carolina, ratified December 4, 1895, article XI, sections 6 and 12.)

(5.) "That she allows all her liquor manufactories, breweries, and distilleries to run as before, both to supply her own needs and ship without inspection their products to other States and foreign countries, giving to her liquor industries both the home and foreign market."

Breweries and distilleries in the State are permitted to run under such rules as may be provided by the State board of control under the act; but they cannot sell liquor in South Carolina except through the dispensary and in competition with the products of other States. (See sec. 15, act.)

(6.) "That she expressly enjoins her State commissioner to buy his liquors for sale in this State from the distillers and brewers in this State when their product reaches the standard prescribed—that is, 'pure'—thus favoring and developing her own liquor industries and products to the disadvantage of the liquor industries and products of other States, where the product of both is 'pure,' and practically enacts a policy of 'South Carolina liquor for South Carolinians.'"

This feature of the act simply gives preference to domestic liquors when they are on all fours with foreign liquors. Attention is asked to the proviso "that such supplies can be purchased as cheaply from such brewers and distillers in this State as elsewhere." Plainly, they are in competition in quality and price; but, further, section 15 was materially changed by the act approved March 6, 1896, which has been called to the attention of the Court. All provision for preference to domestic liquors was repealed, thus leaving no practical question upon that ground. Her policy is not "South Carolina liquor for South Carolinians," but pure liquor for South Carolinians, and that sold and used in an orderly way and unattended by the evils of the dram-shop.

(7.) "That she expressly allows any person in the State to make wine for their own use in the State without any inspection whatever while seizing any wine imported into the State made out of the State for their own use. Again enacting, 'South Carolina made wine for South Carolinians;' that she expressly exempts 'domestic wine from being contraband without seal of commissioner.'"

If no wines were sold through the dispensary save those made in South Carolina, there might be some force in this position, but domestic and foreign wines must alike compete in the market.

(8.) "That for 'the encouragement of grape-growing within the State' she prescribes a scheme of 'contracts with responsible grape-growers in the State for sale of domestic wine through the dispensary so as to encourage grape-growing in this State,' and in furtherance of this object makes a special low rate of profit, and at the same time, while allowing no such arrangement with grape-growers of other States and charging exorbitant prices for wines from other States (not less than 50 per cent. by former act of 1892, fol. 84), she discriminates against wine from other States, and she even seizes as contraband all wines shipped from other States for

use or consumption in this State at its normal price, again enacting the policy 'South Carolina wines for South Carolinians.'"

This position is disposed of by the act of 1896, which repeals the portion of section 23 of the former act referred to and leaves no practical question upon this point. (See Transcript, folio 29, in connection with section 23, act of 1896, attached to suggestion filed.)

(9.) "While fixing by the act itself 'purity' as a mercantile standard and quality of intoxicating liquor good for the use of her citizens, she refuses inspection to liquors from other States, though equally pure, when imported from other States by citizens for their own use, and this, too, while her laws operate to make the liquor supply for use of its own citizens come from her own products to the exclusion of products of other States."

In reply to this we would submit that the police power may go further than a mere inspection, and that is what the dispensary law does. It imposes restrictions as to the manner, place, time, and quantity of sales and persons to whom such sales are made. This is the only method of suppressing the liquor evil, and, we think, is supported by the decision of this honorable Court in *Crowley vs. Christiansen, 137 U. S., 90–92.*

(10.) "While thus discriminating in favor of her own products and refusing inspection according to her own test, the State actually seizes all liquor from another State, and if upon her own test it is found 'pure,' instead of returning it to the owner as having been found to be of the merchantable standard and quality fixed as lawful by the act itself, the State persists in confiscating it, and even sells it to her own citizens, through the dispensary, thus affirming its intrinsic good quality, the result of all of which is she practically prohibits the introduction of foreign liquors while favoring the manufacturing of her own liquor products by her citizens and favoring their use and even their develop-

ment within the State, and if it is found impure she sells it outside of the State, thus doing a business in other States in intoxicating liquors she herself has condemned as unfit for use."

All this is matter of argument already considered, except the last sentence. We are glad to state that the provision for selling impure liquors beyond the State was repealed by the act of 1896. (See sec. 31, Transcript, folio 32, in connection with sec. 31, act 1896, attached to suggestion.) All impure liquors seized are now destroyed by the State chemist.

(11.) "While fostering her own liquor industries and selling liquor to all her citizens and the outside world and foreign nations and Indian tribes, she excluded all the liquor products of sister States (by this discrimination) by a drastic system of penal laws and criminal statutes inflicting heavy penalties against persons having such imported liquor or carriers bringing it into the State, although it may be as pure as the liquor she herself sells."

We take issue with the statement that the State excludes all the liquor products of her sister States. Such is not the case. All liquors may compete for the trade, and domestic and foreign liquors must meet in competition. In fact, but a very small percentage of the liquors sold through the dispensary are the product of South Carolina. While the State is accused of being "in the liquor business," very little liquor is manufactured within her borders, and the liquor supply demanded by her citizens must be sought elsewhere.

In support of the two legal propositions announced on page 25 of his brief, appellee's counsel quotes a whole line of decisions, all of which were considered by Mr. Justice Gray in *Emert vs. Missouri, 156, U. S., 296*, and from which the conclusions in that case were drawn. We rely upon that case as announcing the doctrine held by this honorable Court.

Concluding his argument, appellee's counsel grows apprehensive of the trend of such legislation as the dispensary act. He seems to see in it the beginning of a monster system of paternalism and communism, threatening to control every subject and avenue of trade. But this Frankenstein-like monster is entirely imaginary. He states that Senator Tillman (then governor) was the author of the act, and quotes some extracts from his message to the General Assembly of 1893 for the obvious purpose of attempting to show that the act was born in paternalism. Whether he was primarily responsible for the bill or not we do not know, but the intention of the General Assembly who passed it must be gathered by the Court from the terms of the act itself, and not from any construction placed upon it by the chief executive of the State. The whole dispensary scheme is now before this Court and speaks for itself; and who was the author of it, or whether such author is to be charged with paternalistic views, is neither good argument nor in good taste here.

On page 46 of the brief of appellee's counsel we are surprised to find this language:

"And these cases were followed and principles declared by the State of South Carolina in the cases of McCullough *vs.* Brown, 41 S. C. Rep., 220, 1893. But in a political revolution of South Carolina, after a reconstruction of the supreme bench of the State of South Carolina, in the case of The State *vs.* Aiken, 42 S. C. Rep., 222, 1894, the Supreme Court of South Carolina reversed the former decision, and declared, following the absolute and monarchical systems of continental Europe, that the State, in the exercise of the police power, could usurp and conduct a trade."

This covert stricture upon the Court, of which the learned counsel is an attorney, is both unnecessary and unwarranted. I should not notice it but for the fact that it is directed against the highest Court of the State that I have the honor to represent. The intention of the legislative department

is a frequent subject of question and discussion in the Courts, but any direct or covert attack upon the motives of the judicial department is unusual and is to be regretted. The decisions in *McCullough vs. Brown, 41 S. C., 220*, and *State vs. Aiken, 42 S. C., 222*, are both accessible to this honorable Court and stand upon their own footing.

In conclusion, we again submit that the complainant has failed to show how the dispensary act discriminates against the citizens and products of other States, in favor of the citizens and products of South Carolina, so as to affect rights that the complainant, James Donald, can sue to protect.

WM. A. BARBER,
Attorney General, for Appellants.

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REPLY BRIEF OF J. P. K. BRYAN, COUNSEL FOR APPELLEE.

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REPLY BRIEF FOR APPELLEE.

On the *fifth assignment of error*, in reply to appellants' argument, we remark:

It is to be noted that the defendants, appellants here, who appeared below and appear here, have all been served both with the subpœna and the writ of injunction, and they are all named in the bill and in the subpœna and in the writ of injunction. The question they make is as to the right, if it be a right, of other parties not named in bill,

subpœna, and writ but alleged in the bill to be *parties unknown*. It would seem that the right of such parties should be invoked by the unknown parties themselves when hereafter discovered and served with the writ, and any real question is made as to them or any of them, and not by the defendants, who are actually here under due process in their own right.

Again, it is to be borne in mind that these constables of South Carolina are special constables appointed and discharged at the pleasure of the governor, moving as secret detectives over the whole State, there being constantly new appointments, removals, and resignations, and having *no succession*, but only substitution, in office. (See Dispensary Act, sec. 43, fol. 36.) To say that the court of equity can issue its order of injunction only against the *named* individuals in the order is to say practically that its power cannot be exercised against this ever-changing class, and could be defeated by continuous new appointments and change of personnel of the State constabulary force. Unless the writ goes against some of them named (as here against the chief constable and others by name) and all others then and thereafter constituting the official class, designating them under official title as here, its preventive power would be fruitless.

The final decree of injunction being in this form, against all such constables then unknown, enables the complainant to move for issuance of further writ upon the parties being discovered thereafter, under equity rule 10 of this Court.

Further, this is a matter of discretion of the court below under the 48th rule in equity as to whether the parties were

fairly represented, and inasmuch as it had before it the chief constable and three other constables, and the attorney general of the State appeared as defendant counsel, the decree ought to be regarded as binding upon the whole of the official class so represented.

Even if the "unknown defendants," all the official constabulary class, were here, we contend that they would be bound by the decree under the cases we have cited in our main brief and under equity rule 10 and the following cases:

U. S. vs. Agler, 62 F. R., 824, 827—The court said:

"I think the injunction as against *unknown defendants* is valid and binding when the injunction order is served upon them, although they are not at the time parties to the suit."

U. S. vs. Elliott, 64 F. R., 35—The court again said:

"Objection was made in the *demurrer* and the brief of counsel that the restraining order granted in this case went against parties not named specifically in the bill and the restraining order."

"This, I think, it is competent for the court to do under section 5 of the act aforesaid, *and that it was conformable to the custom and usage of courts of equity*, where there are engaged such large numbers of unknown persons in such unlawful conspiracy."

Ex parte Lennon, 64 F. R., 323:

"The argument is that petitioner was not a party to the suit," &c.

"As to this, it is not necessary that one should be a party to the suit in which an injunction issues in order to render him liable for its violation."

J. P. K. BRYAN,

Counsel for James Donald, Appellee.

165-118

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 6, Original.

THE STATE OF MISSOURI, COMPLAINANT,

vs.

THE STATE OF IOWA.

REPORT OF COMMISSIONERS APPOINTED UNDER DECREE OF FEBRUARY 3, 1896, TO RELOCATE AND REMARK PORTIONS OF BOUNDARY LINE.

FILED DECEMBER 14, 1896.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 15, 1896.

1 To the honorable the Supreme Court of the United States:

The undersigned commissioners, appointed by the decree of your honorable court dated February 3, 1896, to find and remark with proper and durable monuments such portions of the boundary line between the States of Missouri and Iowa, run, marked, and located by Hendershott and Minor in accordance with decree of your honorable court date- June 3, 1851, as have become obliterated, especially between the fiftieth and fifty-fifth mile posts on said line, etc., respectfully submit the following report:

On the 27th day of February last the commissioners met in the city of Chicago and fully discussed matters pertinent to the proper performance of the duties imposed upon them. Construing the decree as applying to all portions of the boundary line in question, the commissioners decided to advertise in newspapers published in counties in Missouri and Iowa adjacent to the boundary for information regarding such parts of said line as were in dispute or had become obliterated. This was done and considerable information elicited, but as the officials of one of the States interested declined to authorize the work necessary in retracing the line, excepting where directed in the decree, nothing was done beyond the finding and remarking "with proper and durable monuments" such portions of the line as was necessary for its proper relocation between the 40th and 60th mile points, as shown hereinafter.

2 After careful consideration it was decided to apply to Gen'l W. W. Duffield, superintendent U. S. Coast and Geodetic Survey, for a detail from his corps of assistants to perform all field-work necessary in carrying out the instructions of the court. It was decided that the employment of expert officers of the Geodetic Survey corps for the service required would result more satisfactorily to the States concerned than would the selection of any private parties, as the high professional attainments of these officers and their freedom from any possible bias regarding the boundary line to be established were ample guarantees for the entire reliability and impartiality of any work done by them.

Correspondence was accordingly had with Gen'l Duffield, who consented to detail two of his assistants, and also to supply them with a complete outfit of all instruments and appliances necessary in the prosecution of the proposed work. This offer was at once accepted. A meeting was afterwards had in St. Louis March 11th, ult., when it was decided to meet at Lineville, Iowa, a point immediately upon the boundary line between Missouri and Iowa, for the purpose of personal investigation as to the proper point or points at which to commence operations. Two of the commissioners accordingly met at Lineville on March 18th, ult., and spent three days in the examination of the boundary line and of points on said line claimed to have been established by Hendershott and Minor in 1850. The first step taken was to decide regarding the proper points between which our work of relocation of

3 that part of the line designated in the decree of your honor-

able court, namely, from the 50th to the 55th mile points on the Hendershott and Minor line, should be commenced. It appeared to us that the cast iron monuments placed by Hendershott and Minor at intervals of ten miles would naturally be more reliable than any traditional points, and the first investigations were made as regarding the 40th, 50th, and 60th mile points, these being originally marked by Hendershott and Minor with iron monuments as stated. After careful examination and much inquiry the commissioners were satisfied that the monuments marking the 40th and 60th mile points were in their original positions. As regarded the monument at the 50th mile point, whilst no positive evidence could be had as to its removal from its original position, the rumors and statements were such as to render its reliability a matter of doubt, and it was, therefore, determined to use the monuments at the 40th and 60th mile points as fixed points between which to relocate the boundary line.

It was subsequently arranged for the commissioners to meet at Davis City, Iowa, a point on the Chicago, Burlington & Quincy railroad adjacent to the 40th mile point, where it was proposed to commence work. Gen'l Duffield was accordingly notified, and on Wednesday, April 8th, ult., the commissioners reached Davis City and met Messrs. W. C. Hodgkins (in charge of work) and A. L. Baldwin, of the U. S. Geodetic Survey corps, detailed as per arrangements made with Gen'l Duffield. These gentlemen brought with them a very complete outfit of instru-
4 ments of the best description used in geodetic work, including all necessary equipment for astronomical observations as well as field-work. We proceeded to the 40th mile point on the afternoon of April 8th, ult., and arranged for the commencement of work the following day. On April 9th, ult., a party for field-work having been organized and the necessary teams and wagons hired, the entire party proceeded to Pleasanton, Iowa, a point situated immediately on the boundary line just east of the 45th mile point. Pleasanton and Lineville subsequently became the bases of operation, our parties changing from one of these points to the other as the necessities of the work required.

Work was commenced at the 40th mile point, as arranged. It soon became quite evident that the actual boundary line as indicated by points shown and satisfactorily identified differed from the line as would be established by the field-notes of the Hendershott and Minor survey. In order that the relative positions of the actual mile points between the 40th and 60th mile points could be properly determined, and also their true relation to the theoretical points as found in accordance with the courses and distances shown in Hendershott's report, it was deemed necessary to establish a chord or base line twenty miles in length between the 40th and 60th iron monuments to which all points actually found and definitely located or shown and claimed as being upon the boundary line could be referred and from which all points finally de-
termined could be accurately located. For the details of
5 the actual field-work and its results we respectfully refer to

the accompanying report of Mr. W. C. Hodgkins, in charge of party (Appendix "A"). It is proper here to state that the field-work, done as it was in accordance with the precise methods of the U. S. Geodetic Surveys, was necessarily very slow and tedious, but its accuracy, in our opinion, cannot be questioned. The measurement of the twenty-mile base line involved a very great amount of labor, whilst the computations necessary in the exact reduction of the measurements were also very laborious. Complete topographical notes were also taken for the entire work, but the commissioners have deemed it unnecessary to have maps prepared, as their preparation would involve a considerable expense without any corresponding benefit. The very unfavorable weather during a great portion of May and a part of June interfered seriously with the prosecution of the field-work, causing a delay of from two to three weeks.

Careful examination was made in every instance for the precise location of the original Hendershott and Minor mile points, but out of twenty-one of these points included in the survey only nine, including three iron monuments, could be satisfactorily identified. The 42d, 43d, 44th, 49th, 54th, and 58th mile points were identified and located by evidence entirely satisfactory to the commissioners. As regards the 50th mile point (iron monument), concerning the reliability of which doubt had existed, the commissioners are
6 satisfied that it is very little, if at all, out of its original position—its relation to the 49th mile point (which was clearly identified as Hendershott's original point) as determined by the base line confirming our judgment. After the work of relocation had commenced and preliminary work on the twenty-mile base well advanced, statements were made to the commissioners to the effect that the iron monument at the 60th mile point had at one time been moved from its original position. This being a matter of importance—the monument in question being considered as a fixed point in establishing the base line—an inquiry was had regarding it and a considerable amount of testimony heard. This testimony was very conflicting, but after its careful consideration and the prolongation of the base line some four miles eastward of the 60th mile point the commissioners were satisfied that the monument was occupying its original position.

The location of the 52d mile point was more difficult and involved a much more extended investigation than for any point established by the commissioners. It was claimed and strongly urged that the original 52d mile point as established by Hendershott and Minor was at a point witnessed by two trees—an elm and an oak—which trees, as well as a point established from them in accordance with Hendershott and Minor field-notes, were shown. The field-notes regarding this point and also the 53rd mile point are as follows:

7

(Chains.)

" 80.00 Set 52d mile post.
Bearings, elm 18 inches diameter, N. 87¼° E. 10½ links; burr oak 12 inches diameter, S. 22° W. 28 links."

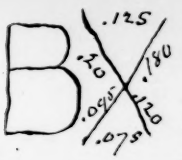
(Continuing:)

" N. 88° 47 E.

(Chains.)

" 0.30 A pond 250 links wide; direction of its length, N. & S.
5.00 Prairie.
15.00 Timber.
30.00 Field (Stokes') fence, nearly N. & S.
57.50 Left field.
80.00 Set 53d mile post." Bearings, black oak 8" diameter, S. 53° E. 15 links; black oak 6" diameter, N. 53° E. 64 links.

The trees shown and claimed as being the original witness trees for Hendershott and Minor's 52d mile point agree very well with the field-notes as regards their distance from the 51st mile point, and also as to their relative positions to each other. The distances and bearings of these trees from the point shown and claimed as the original Hendershott mile point also agree with the field-notes closely. Beyond these coincidences, however, there is, in our judgment, nothing whatsoever to warrant a conclusion that they were ever marked as witness trees by Hendershott and Minor. In their
8 report (10th Howard, pages 15 and 16) they state: "In timber the number of the mile is marked on the witness trees with the letter appropriate to each State, there being one tree marked on each side of the line wherever possible. The foot of each witness tree is marked 'B. L.'" The oak tree shown and claimed to be a witness tree for the 52d mile point had a large "blaze" on its trunk about five feet from the ground. Nothing whatever could be ascertained by the commissioners to in any manner indicate what, if any, marking had been inscribed on the blaze, nor could any information be had concerning such marking. At the foot of this tree, facing N. 45° E., is to be seen a blaze on which is plainly discernable the letters "B. X." The blaze on the trunk of the tree faced directly east, whilst the point to which it is claimed to refer is but 22° east of north from the tree. It is the universal custom of surveyors in marking witness trees, so far as the experience of the commissioners goes, to make such marks so as to face as nearly as possible the point witnessed. The "B. X." mark faces certainly 25° east, and the blaze on trunk of tree 68° east of the point claimed to be witnessed. Measurements of the "X" mark at base of tree are as follows, in tenths of one foot:



9 The mark inclining to the left extends above the letter "B" and is quite close to the upper curved line. The mark inclining to the right runs closely to the lower part of the "B." It would have been quite as practicable to have cut a letter "L" as an "X" on the blaze found at foot of this tree, and the commissioners were not prepared to accept this letter "X" as an "L" without stronger corroborative evidence than they could obtain. This tree, if marked by Hendershott and Minor, must have been so marked forty-six years ago. A section of the tree at a point eight feet above the ground, the tree being very uniform in size, from three feet above the ground for eight to nine feet above, was cut and sent to Prof. McBride, botanical expert at the University of Iowa, for his opinion (as expert) as to its age, etc.

In a letter from him to Commissioner Dey, May 19th, 1896, he states:

"I judge that the tree when felled was 70 years old. Its history runs about as follows: 59 years ago it received an injury (blaze?) of which a scar persists. The tree at the time was about 11 years (11–16) old, and not to exceed, bark included, 3¼ inches thick. I say about 11 years, for it takes some years not recorded on the section for a tree to attain six feet in height. 25 years later the tree had added about 2½ inches to its radius. The next 17 years a little more than one inch to the radius, making the diameter of the wood (bark not counted) about 8¼ to 8½ inches. Since this another
10 inch of wood has been added to the radius. Calling this 17 years (it is more rather than less, as the annual increment is constantly smaller), we have the total since the scar, 59 years."

This oak tree, as shown by Prof. McBride, at point where section examined by him was cut, was 8¼ to 8½ inches in diameter when 53 to 58 years old. Being 70 to 75 years old, it would have been 24 to 29 years old in 1850, and its diameter where blaze was found could not have exceeded 5 inches. As the blaze shows a face of fully eight inches, it is evident it could not have been cut on a tree with a diameter of only five inches. The diameter of this tree at base, where "B X" mark was found, is now 15 inches. Applying the proportionate growth of tree as shown by Prof. McBride and its diameter at base could not have exceeded 8.5 inches 46 years ago, and its size was not sufficient to have received the blaze now shown.

Regarding the elm tree, also claimed to be a witness tree for the original Hendershott 52d mile point. This tree also has a large blaze about four feet from the ground. Nothing whatever was shown to prove that it ever had any mark upon it (prior to the

time of a private survey made in 1893) other than the characters "S 28." The letter "S," if it ever existed, is now totally obliterated. The figure "2" is still plainly discernable, and a part of the upper portion of a figure "8" to the right of the "2" can also be traced.

11 Nothing was shown to prove that it was ever marked at its base with the letters "B L," as it should have been were it a Hendershott witness tree. Diligent search had evidently been made at some time for this mark, as is plainly evidenced by the chopping at its base, and had the proper marks ever been found it is quite certain the fact would have been in evidence before the commissioners.

The Hendershott notes show that at 30 links eastward of the 52d mile point the bank of a pond was reached, and that the pond itself was 250 links in width, making a distance of 280 links from the 52d mile point to the east bank of pond. The bank of this pond directly east of the 52d mile point, claimed to be witnessed by the "elm and oak," has evidently moved eastward to some extent since 1850, as shown by present conditions. Measurements made by the commissioners show that 280 links eastward from the point claimed as the Hendershott 52d mile point reach a point 59 links east of the present bank of the pond. Thirty chains east of their 52d mile point, as seen by their notes, the Hendershott line crossed the "Stokes" field fence. The line of this fence is still plainly visible. A line straight from the 52d mile point, claimed to be witnessed by the "elm and oak," to the 54th mile point will pass at least 70 feet south of the "Stokes" fence line, as noted by Hendershott. For more than thirty years, and after the establishing of the boundary line by Hendershott and Minor, it is claimed a road was maintained and worked as a Missouri road between the 52d and 54th mile points, and that until within the past five years this fact was never questioned. It is claimed that the line recognized by

12 parties living on both sides of the boundary as being the Hendershott line since his survey and until within the past few years is now plainly shown for a very considerable distance between the 52d and 53d mile points by the line of what is known as the "Fugate" fence line. It is claimed this fence was put up by one Fugate, the owner of land in and a resident of Iowa (and who was also a surveyor), and who, living as he did close to the line and present when the Hendershott survey was made, probably knew where the true line was and placed his fence on that line. This line very closely agrees with a line running directly from Sullivan's 52d mile point to the 54th mile point, the last named having been satisfactorily identified and located by the commissioners. It is claimed to be improbable that Fugate placed his fence north of the proper line.

The commissioners most carefully considered all the conditions relating to the point claimed to be the Hendershott 52d mile point and witnessed by the "elm and oak," but the more the matter was weighed the stronger became their conclusion that the trees mentioned could not have been the witness trees as claimed. Coincidences of position constitute their claim. It is proper here to state

that within a short distance to the north of the 52d mile point as established by the commissioners are the stumps of an elm and burr oak which agree as well as do the other elm and oak as to distance from the 51st mile point, better as to topographical conditions, and are very similar as to the relative posi-
13 tion required by the field-notes for the witnesses to the 52d mile point. The commissioners have no idea that these stumps referred to were those of Hendershott's witness trees, but make this statement to show that coincidences such as shown by the "elm and oak" are not impossible. To have crossed the "Stokes" fence, in a distance of 30 chains, starting from the supposititious 52d mile point claimed to be witnessed by the elm and oak, an angle of at least 2° to the left would have been necessary, and also another angle to the right equally great in order to run directly to the 54th mile point. Hendershott's notes make no mention of any such angles. The angle recorded as having been made at the 52d mile point was .29′ to the north, the course having been changed, according to the Hendershott notes, from N. 89° 16′ E. to N. 88° 47′ E. We are satisfied, from personal investigation and from points found and referred to our base line, that the original Sullivan line can be readily traced from his 51st mile point to his 52d mile point, and we believe it very probable that the Hendershott line between the 52d and 54th mile points is nearly identical with the Sullivan line. Whilst we did not adopt the Sullivan line between the points named, very good reasons could have been given for doing so. The Hendershott notes make no mention of Sullivan's line after leaving his 49th mile point until his 54th mile point was reached. They make no mention of finding Sullivan's 52d mile point or of any trees on his line; but they say in their report (page 4, 10th Howard Report) that they "discovered
14 abundant blazes and many witness trees which enabled us to find and remark the said (Sullivan) line as directed by the court." Also on page 7, same report, it is stated: "*But in heavy bodies of timber no difficulty was experienced in discovering evidences of the precise location of the* (Sullivan) *line, not only by blazes, but by line and witness trees.*" (Italics are ours.) And on same page, "The general topography of the country, and especially the crossing of the streams, greatly facilitated us in following the line, and in some instances, when conformed by the old blazes, enabled us to establish it with sufficient certainty." Commencing some ten chains east of the 51st mile point, the country through which the boundary line passes was and is heavily timbered, and, as before stated, the Sullivan line in the timber is at this time readily to be found. The inference that the Hendershott line eastward from the 51st mile was nearly identical with the Sullivan line is quite as strong as the contrary, notwithstanding no mention is made by Hendershott of the Sullivan line after leaving a point 6.20 chains east of the 49th mile point until reaching the 54th mile point.

The Sullivan line, between the 51st and 52d mile points, as shown by his field-notes, crossed the east fork of Grand river (now called Weldon) three times. This line now, by reason of changes in the

time of a private survey made in 1893) other than the characters "S 28." The letter "S," if it ever existed, is now totally obliterated. The figure "2" is still plainly discernable, and a part of the upper portion of a figure "8" to the right of the "2" can also be traced.

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12 parties living on both sides of the boundary as being the Hendershott line since his survey and until within the past few years is now plainly shown for a very considerable distance between the 52d and 53d mile points by the line of what is known as the "Fugate" fence line. It is claimed this fence was put up by one Fugate, the owner of land in and a resident of Iowa (and who was also a surveyor), and who, living as he did close to the line and present when the Hendershott survey was made, probably knew where the true line was and placed his fence on that line. This line very closely agrees with a line running directly from Sullivan's 52d mile point to the 54th mile point, the last named having been satisfactorily identified and located by the commissioners. It is claimed to be improbable that Fugate placed his fence north of the proper line.

The commissioners most carefully considered all the conditions relating to the point claimed to be the Hendershott 52d mile point and witnessed by the "elm and oak," but the more the matter was weighed the stronger became their conclusion that the trees mentioned could not have been the witness trees as claimed. Coincidences of position constitute their claim. It is proper here to state

that within a short distance to the north of the 52d mile point as established by the commissioners are the stumps of an elm and burr oak which agree as well as do the other elm and oak as to distance from the 51st mile point, better as to topographical conditions, and are very similar as to the relative position required by the field-notes for the witnesses to the 52d mile point. The commissioners have no idea that these stumps referred to were those of Hendershott's witness trees, but make this statement to show that coincidences such as shown by the "elm and oak" are not impossible. To have crossed the "Stokes" fence, in a distance of 30 chains, starting from the supposititious 52d mile point claimed to be witnessed by the elm and oak, an angle of at least 2° to the left would have been necessary, and also another angle to the right equally great in order to run directly to the 54th mile point. Hendershott's notes make no mention of any such angles. The angle recorded as having been made at the 52d mile point was .29′ to the north, the course having been changed, according to the Hendershott notes, from N. 89° 16′ E. to N. 88° 47′ E. We are satisfied, from personal investigation and from points found and referred to our base line, that the original Sullivan line can be readily traced from his 51st mile point to his 52d mile point, and we believe it very probable that the Hendershott line between the 52d and 54th mile points is nearly identical with the Sullivan line. Whilst we did not adopt the Sullivan line between the points named, very good reasons could have been given for doing so. The Hendershott notes make no mention of Sullivan's line after leaving his 49th mile point until his 54th mile point was reached. They make no mention of finding Sullivan's 52d mile point or of any trees on his line; but they say in their report (page 4, 10th Howard Report) that they "discovered abundant blazes and many witness trees which enabled us to find and remark the said (Sullivan) line as directed by the court." Also on page 7, same report, it is stated: "*But in heavy bodies of timber no difficulty was experienced in discovering evidences of the precise location of the* (Sullivan) *line, not only by blazes, but by line and witness trees.*" (Italics are ours.) And on same page, "The general topography of the country, and especially the crossing of the streams, greatly facilitated us in following the line, and in some instances, when conformed by the old blazes, enabled us to establish it with sufficient certainty." Commencing some ten chains east of the 51st mile point, the country through which the boundary line passes was and is heavily timbered, and, as before stated, the Sullivan line in the timber is at this time readily to be found. The inference that the Hendershott line eastward from the 51st mile was nearly identical with the Sullivan line is quite as strong as the contrary, notwithstanding no mention is made by Hendershott of the Sullivan line after leaving a point 6.20 chains east of the 49th mile point until reaching the 54th mile point.

13

14

The Sullivan line, between the 51st and 52d mile points, as shown by his field-notes, crossed the east fork of Grand river (now called Weldon) three times. This line now, by reason of changes in the

bed of the stream, will cross the Weldon five times. With the exception of the "elm and oak," there were no traditional or apparent evidences claimed as indicating the original location of the Hendershott and Minor 52d mile point. A line run eastward with the bearings given by the Hendershott notes from their 51st mile point would pass at least 40 feet south of the point indicated by the "elm and oak." A line run eastward, as per the Hendershott notes, from the point claimed as the Hendershott and Minor 52d mile point would pass at least 90 feet south of their 54th mile point. The commissioners carefully considered all the comparatively authentic traces of the Hendershott line, together with the topographical conditions given in the notes of the survey. Between the 53d and 54th mile points were found evidences of the Hendershott line, which were satisfactory, and the line established by us was run from the 54th mile point, which, as before stated, was identified, directly to the 52d mile point and passing through the points found between the 53d and 54th mile points. The Hendershott notes show a line direct from the 52d to the 54th mile point.

The line, as finally established and marked by us, between the 52d and 53rd mile points is north of the boundary line as claimed for Iowa and south of that line as claimed by Missouri, and, as it happens, very nearly equally divides the narrow territory in dispute, although there was no intention to compromise the difference. We are satisfied that the line, as established by us between the 53d and 54th mile points, is very nearly, if not identical with, the original Hendershott line and in accordance with the marks of that survey. The same line was produced to the 52d mile point, notwithstanding it passes considerably south of the plainly indicated Sullivan line. The 52d mile point, as established and marked by us, was placed as nearly as possible in accordance with the notes of the Hendershott survey, evidenced by the width of the pond and also its distance from the "Stokes" fence line.

The field-notes of the Hendershott and Minor survey show as follows:

At 6.30 chains eastward from the Hendershott 42d mile point Sullivan's 42d mile point was found and course changed at that point from N. 88° 53′ E. to N. 89° 06′ E.

6.37 chains eastward of Hendershott's 43d mile point Sullivan's 43d mile point was found and course changed at that point from N. 89° 16′ E. to N. 89° 47′ E.

7.00 chains eastward of Hendershott's 44th mile point Sullivan's 44th mile point was found and course changed at that point from N. 89° 47′ E. to N. 89° 9′ E.

6.20 chains eastward from Hendershott's 49th mile point Sullivan's 49th mile point was found and course changed at that point from N. 89° 9′ E. to N. 89° 16′ E.

4.07 chains eastward of Hendershott's 54th mile point Sullivan's 54th mile point was found and course changed at that point from N. 89° 16′ E. to N. 89° 2′ E.

2.53 chains eastward of Hendershott's 58th mile point Sullivan's

58th mile point was found and course changed at that point from N. 89° 2′ E. to N. 89° 27′ E.

In each instance it will be seen that the Hendershott courses are changed at the Sullivan mile points. The decree of your honorable court made January 3, 1851, declared that the line should
17 be direct between each Hendershott mile point, and it is evident that the actual courses between the points referred to above are not in accordance with the recorded courses. It was found by reference to our base line in all cases where the field-notes show a straight line between such points that when the distance recorded as a straight line was two or more miles the line is actually a curve. The ordinates measured from the base line do not show any regular rate of curvature, and the curves themselves swing to the south and then to the north, the base line crossing the boundary line three times in twenty miles. The greatest distance of base line from boundary line is at the 55th mile point, which is about 247 feet north of base. The 46th mile point is 160 feet south and the 60th mile point 153 feet south of base.

It is difficult to account for the discrepancies found between the recorded line as shown in Hendershott's notes and the line actually found. It is quite possible that the irregularities either grew out of the inaccuracy of the solar compass used on the survey or an inaccurate use of the instrument itself.

We were surprised at the facility with which the Sullivan line could at the time of our survey be traced for considerable distances along the twenty miles of line included in our operations. Of twenty-one mile points from the 40th to the 60th, inclusive, Sullivan had witness trees for fifteen. Some of these witness trees can now be found, and also well-defined line trees mentioned by him.
On Hendershott's line only eight mile points out of the
18 twenty-one referred to were witnessed by trees. Had the care shown by Sullivan in marking his line been exercised by Hendershott and Minor the line of the latter would have been much more fully and satisfactorily defined. The hurried manner in which the work of the Hendershott survey was performed (151 miles of relocation, in addition to random lines, having been accomplished in 30 days) may in some measure account for the great lack of witness trees and other evidences necessary for an actual location of the boundary line of 1850. We are inclined to the opinion that, so far as regards the twenty miles mentioned, the Sullivan line can be as readily relocated as can the Hendershott line.

The decree of your honorable court requires that the line relocated by us shall be marked with durable monuments. Twenty-one mile points included in the line relocated, being from the 40th to the 60th mile, inclusive, are now marked as required. The 40th, 50th, and 60th miles are marked with the cast-iron monuments originally placed by Hendershott and Minor, in 1850. Mile points intermediate are marked with stone monuments. These are of the best quality of Missouri red granite, are twelve inches square, and from 6′ 2″ to 6′ 6″ in length. The stones stand 2′ above ground (this

portion being hammer-dressed) and are well finished in every particular. On the north side of each stone is plainly cut the word "Iowa," on the south side the word "Missouri," on the east side the words "State line," and on the west the figures denoting the number of the mile point.

19 The iron monuments were reset so as to show about 18 inches above ground. The granite monuments were set with great care, their apices being exactly on the line. They were well rammed when placed in ground and will need no witness trees. Their weight averages 1,050 pounds each, and we think they can safely be pronounced both durable and permanent. The amount paid for them includes all freight charges and expense of delivery and setting.

Attached hereto (Appendix "B") is a statement of the expenses consequent upon the relocation and marking that portion of the boundary line between the 40th and 60th mile points, which statement is respectfully submitted for the action of your honorable body.

Attached hereto (Appendix "C") is a photograph of the section of the oak tree examined and reported on by Prof. McBride.

JAMES HARDING,
Comm'r for Missouri.
PETER A. DEY,
Comm'r for Iowa.
DWIGHT C. MORGAN,
Of Illinois.

Chicago, Ill., Sept. 18, 1896.

20 APPENDIX "A."

U. S. COAST AND GEODETIC SURVEY,
SALINA, KANSAS, *June 20th*, 1896.

Gen. James Harding, Hon. Peter A. Dey, Dwight C. Morgan, Esq., commissioners in the matter of the boundary line between the States of Missouri and Iowa.

DEAR SIRS: I have the honor to submit the following report upon the operations conducted under my direction for the purpose of enabling you to locate and mark by "durable monuments," as required by the decree of the Supreme Court of the United States dated February 3rd, 1896, that portion of the boundary line between the States of Missouri and Iowa which lies between the fortieth and sixtieth mile posts east of the old northwest corner of Missouri, as marked in 1850 by H. B. Hendershott and W. G. Minor, commissioners.

It appears unnecessary for me to make any mention in this report of the antecedent circumstances leading up to this survey, as you are well acquainted with them, and will, no doubt, take occasion to allude to them in your own report to the Supreme Court.

I therefore pass at once to my own work.

21 Your board having applied to General W. W. Duffield, superintendent of the U. S. Coast and Geodetic Survey, for the detail of an officer to make the necessary surveys, I was selected for that duty, and Mr. A. L. Baldwin, also of the C. & G. Survey, was assigned to the party as assistant observer.

In compliance with the request of your board, received through Mr. Morgan, we met you on April 8th, 1896, at Davis City, Iowa. A preliminary inspection of the western portion of the field of work was made on that day and the organization of the party was completed by engaging laborers and teams.

On the following day the whole party was transferred to the village of Pleasanton, Iowa, that place being centrally located for the western half of the work, as it is directly on the boundary and just east of the forty-fifth mile post.

A partial examination of the line, as identified by more or less reliable traditions current in its neighborhood, made it evident that its course in many places deviated widely from the description given in the field-notes attached to the report of the former commission. (Howard's Reports, Supreme Court U. S., vol. X.)

22 Not only do the bearings differ from those recorded in that report, but portions of the line which are there called straight were found to be curved or composed of broken lines.

Under these conditions it seemed inexpedient to attempt to reproduce upon the ground the courses and distances of the former survey.

Such an attempt would undoubtedly have led to serious confusion, and would have furnished little information of real value, while the labor of making the necessary corrections would have been excessive.

In place of that undesirable plan I adopted, with your approval, the method of measuring a base line straight across country for the twenty miles to be surveyed.

All of the old points which were recovered and all new points which it became necessary to locate upon the ground were directly referred to the base line, which, from a mathematical point of view, is the axis of abscissæ in a system of rectangular co-ordinates.

23 It seems scarcely necessary to mention the advantages which this method affords in point of simplicity and accuracy of work, but it may do no harm to allude very briefly to a few of them.

Thus the relative positions and bearings of different portions of the boundary can be readily found with far greater precision than would otherwise be easily practicable.

Moreover, in this system of work each point of the boundary is fixed independently of every other point, all being directly referred to the base line. This characteristic permits any desired local correction to be made at any point without necessarily affecting points on either side, a feature which I consider very essential in work of this character. The base line was so selected as to lie along the general direction of the boundary, which in fact crosses it three

times, eleven of the twenty-one monuments being north of the base and the other ten south of it.

This statement well illustrates both the irregularity of the boundary and the fact that the base line is very close to the general direction of the line.

24 Another important consideration in the selection of the base line was to make it pass through the towns of Pleasanton and Lineville without meeting obstructions and without damaging private property.

This was successfully accomplished, and in the whole course of the line remarkably little tree-cutting was needful. The base line was ranged out with an eight-inch theodolite, the standards of which were high enough to permit the telescope to transit. The telescope was of excellent quality and was provided with an eye-piece micrometer, by means of which slight deviations from the straight line could be measured and corrected.

As the work of locating the base line advanced eastward the party was moved to Lineville, Iowa, which town is situated just north of the boundary line and between the fifty-sixth and fifty-seventh mile posts, and thenceforward operations were conducted from either Lineville or Pleasanton, as was found more convenient from time to time.

25 As soon as the line was opened, and even before the final adjustment of its eastern terminus, the linear measurement was begun by Mr. Baldwin, with the assistance of the commissioners, working westward from the east end of the base, near the sixty-mile monument.

When about five and one-half miles had been so measured I was ready to take personal charge of the measurement, and began at the west end of the base, near the forty-mile monument, working thence eastward to a junction with the line above mentioned.

The system of measurement employed was that ordinarily used in the Coast and Geodetic Survey for direct measures not requiring the base apparatus.

A narrow steel tape, twenty-five metres in length between end marks, was stretched under a tension of ten kilogrammes, as indicated by a spring balance attached to one end of the tape. The successive tape-lengths were marked on stakes driven into the ground.

26 As the tape necessarily follows very closely the inclination of the ground, the horizontal distance will be less than the measured distance, and the correction for slope must be computed for each tape-length, the difference of height between the ends being determined by spirit-level. The very irregular profile of this line made these differences of height unusually great, and correspondingly increased the amount of correction.

A small correction for catenary is also necessary when the tape swings clear of the ground, the "sag" of the tape slightly decreasing the distance between its ends. Further, as all metallic measures vary in length with changes of temperature, it is necessary to

apply a correction for such variations, the length of the tape being known at the temperature of zero, Centigrade.

Temperatures were accordingly noted at frequent intervals, usually at every fourth tape.

The direct measurement was completed on May 8th, although the eastern part of the line had still to be levelled.

The computations were at once taken in hand and the
27 resulting distances were furnished you as rapidly as possible.

These results, for present purposes and as compared with any ordinary measures, may be considered practically exact, and they show that the chain used by the surveyors of 1850 was too long, probably from the combined effects of abrasion and of high temperature.

The distances between such of the old points as were recovered are nearly always too great. The ratio of excess is not constant, as, indeed, would hardly be expected, but shows a tendency to increase in going from west to east.

A marked exception to this rule of excess in distance is found in the fifty-second mile. The eastern end of this mile was not recovered, but was found with reasonable certainty from various considerations, while the reputed point at the western end was recovered. The mile so determined is noticeably less than a statute mile. The western part of this mile traverses a very steep, rough, and wooded country, while its eastern part crossed the Weldon river three times in 1850.

28 These natural difficulties in the way of accurate measurement probably caused the shortage in this particular mile.

In my own work I found it desirable to avoid the direct measurement of this mile, which is even more unfavorable now than in 1850, the Weldon having changed its course sufficiently to cross the base line five times at present.

For this purpose a branch base about seven-eighths of a mile in length was measured on the flat ground east of the Weldon, and the distance across the broken section was then obtained with great precision by triangulation. The distances across Grand river and Little river were also obtained by triangulation.

Whenever in the course of the measurement we passed a point which it was desirable to refer to the base line, the point at which its rectangular ordinate met the base line was noted and the length of the ordinate itself was measured. The relative positions of these various points thus became known, including not only such of the mile points as could be identified, but also numerous objects commonly reputed to mark the boundary, as fences, trees, stones, etc.

As far as possible in connection with the measurement,
29 notes were made to provide material for a topographic sketch of the strip of country traversed by the boundary.

As stated above, the measurement was completed on May 8th. As rapidly as the reductions were computed the places for the milestones were marked on the ground from the fortieth to the forty-ninth.

The weather, which up to that time had been generally favorable,

now became very wet. The frequent and heavy rains seriously interfered with the work, and rendered progress across the country very slow, the roads being nearly impassable and the fords quite so. On May 18th the exigencies of the regular work of the Coast and Geodetic Survey compelled the detachment of Mr. A. L. Baldwin, who had rendered energetic and efficient assistance in the work.

On that same day I moved from Pleasanton to Lineville to resume work on the eastern part of the line. In the intervals between rains I completed the levels, and, after computing the dis-
30 tances, marked the places for the mile posts, a work in regard to which further details will be given below. The topographic notes were also completed.

In order to furnish as much information as possible in regard to this portion of the boundary line, observations for the approximate determination of the latitude and longitude and of the astronomical azimuth or bearing of the base line were made at Pleasanton and at Lineville.

Bad weather interfered with the observations at Pleasanton, and at Lineville the lack of time and unfavorable local conditions somewhat affected the precision of the results, which answer, however, the purpose desired. Latitude and azimuth were obtained by observations on Polaris (α Ursæ Minoris) with the theodolite. Time was obtained by sextant observations of the sun, using a mercurial horizon and the method of equal altitudes. For longitude the local time was compared with the railroad telegraphic time
31 signals. It remains for me only to state briefly the old points which were recovered and the conditions which, under your decisions, governed the location of those points which were not identified by local marks.

The fortieth, the fiftieth, and the sixtieth mile points were found marked by the iron monuments placed there by Commissioners Hendershott and Minor in 1850. There was some dispute as to whether No. 60 was in its original position or not, but the weight of evidence and the continuity of the traditional line on either side of it indicated pretty conclusively that it had never been disturbed.

The remaining points were originally marked by stakes, sometimes witnessed.

No. 42, while not directly identified by marks, was satisfactorily recovered by means of a "line tree" four chains W. and by topographical notes at crossing of Grand river, as shown in original record.

No. 44 was restored by measurement from the two witness trees, the decaying stumps of both of which were found.

No. 49 was also identified by the stumps of both witness trees.

32 No. 51 was marked by a "mound and pit," which have been accepted for years as the true marks.

No. 54 was marked by a stone, and was further identified by one witness tree.

No. 58 was recovered by traces of the stakes in addition to the remains of the witness tree, and the point established by J. C. Sul-

livan in 1816 was also found a little further east, and also the stump of an elm tree, noted as a "line tree" in both Sullivan and Hendershott notes, being 4.10 chains W. of Hendershott's 58th mile point. The remaining points were located in the following manner:

No. 41 was placed midway on line between 40 and 42.

No. 43 was so placed as to preserve the relations with 42 and 44 required by the field-notes of 1850, and after being so located was found to agree with the stump of the witness tree on the Iowa side of the line.

No. 45 was placed in the middle of the street bounding Pleasanton on the south, which middle line is shown as the boundary on the official plat of the town on file at the county-seat, and at the proper distance along the line averaging to the 49th mile.

No. 46 was similarly located on the line passing from 45 through a stone pointed out by tradition as marking the line.

33 No. 47 was placed at the proper distance on a line drawn straight from 49 westward through a witnessed section corner between 47 and 48.

No. 48 was placed on the same line midway between 47 and 49.

No. 52 was located at a point west of the pond or lake in the Weldon bottom agreeing with the topographic description given by the former commissioners and on a line agreeing as closely as possible with all of the apparently authentic traces of the line surveyed in 1850.

No. 53 was placed a mile west of 54 on the straight line between 52 and 54.

No. 55 was placed a mile east of 54 on the extension of the line drawn from 54 through a witnessed stone at the corner common to Wayne and Decatur counties, Iowa.

Nos. 56 and 57 were placed at mile distances on the straight line drawn from 55 through an iron pin at the southwest corner of the streets surrounding the public square at Lineville, which pin was universally accepted as a point marking the boundary. Un-

34 successful search was also made for the remains of a wooden post which formerly stood a little further east.

No. 59 was placed midway between 58 and 60, in the manner required by the field-notes of 1850.

While this work was in progress many of the inhabitants along the line asked that additional points, intermediate between the mile points, might be furnished them, and with your approval this was done.

In accordance with the decree of the Supreme Court dated January 3rd, 1851, such points were always placed on the straight line between the adjacent mile posts. The final observations were made on the afternoon of June 13th, and the instruments were then packed, and on the 15th were shipped to Washington.

I left Lineville on June 15th, also, to resume my regular duties in the Coast and Geodetic Survey.

In closing this report permit me to express my appreciation of

the uniform courtesy and consideration shown my assistant
35 and myself by all the members of the commission, and my hope that our earnest labors in this interesting work have proved satisfactory in methods and results, and that they may be instrumental in permanently settling this controversy.

The appended pages give in summarized form the results of the observations and measurements, as well as the mathematical formulæ employed.

Respectfully submitted.

W. C. HODGKINS,
Assistant, Coast & Geodetic Survey, Chief of Party.

36 APPENDIX A.

The following table gives the bearings and distances between the successive mile posts of the Missouri-Iowa boundary from the fortieth to the sixtieth mile east of the initial point as the said mile posts were relocated and marked by James Harding, Peter A. Dey, and Dwight C. Morgan, commissioners, in 1896.

The distances are given to the nearest tenth of a metre and to the nearest half foot, and the bearings or azimuths to the nearest quarter minute.

The azimuth is reckoned from the south point as zero in the direction of west, north, and east successively—*i. e.*, 90° means due west, 270° due east, etc.

The convergence of the meridians is $44\frac{1}{2}$ seconds for each mile. The bearings going west, or back azimuths, are therefore in each case three-fourths of a minute greater than the eastern or direct azimuths.

37

Mile.	Azimuth.	Back azimuth.	Distance.	
			Metres.	*Feet.*
40 to 41	268° 57¾′	88° 58½′	1,610.1	5,282½
41 to 42	268 58½	88 59¼	1,610.1	5,282½
42 to 43	269 20½	89 21¼	1,610.1	5,282½
43 to 44	269 58¾	89 59½	1,603.8	5,261½
44 to 45	269 52¾	89 53½	1,616.7	5,304
45 to 46	269 51	89 51¾	1,610.2	5,283
46 to 47	269 11	89 11¾	1,610.1	5,282½
47 to 48	268 55½	88 56¼	1,610.1	5,282½
48 to 49	268 56¼	88 57	1,612.7	5,291
49 to 50	269 16¾	89 17½	1,608.3	5,276½
50 to 51	269 04½	89 05¼	1,613.3	5,293
51 to 52	268 10¼	88 11	1,595.8	5,235½
52 to 53	268 17¾	88 18½	1,626.1	5,335
53 to 54	268 18½	88 19¼	1,613.2	5,292½
54 to 55	268 57½	88 58¼	1,611.5	5,287
55 to 56	269 33	89 33¾	1,611.5	5,287
56 to 57	269 33¾	89 34½	1,611.5	5,287
57 to 58	270 48	90 48¾	1,612.0	5,289
58 to 59	270 36¾	90 37½	1,613.8	5,294½
59 to 60	270 39	90 39¾	1,613.8	5,294½

38 *Offsets from Base Line.*

	M.			M.	
Mon't No. 40,	3.3 = 11	ft. N.	Mon't No. 51,	23.7 = 78	ft. S.
" " 41,	8.8 = 29	" "	" " 52,	7.6 = 25	" N.
" " 42,	14.3 = 47	" "	" " 53,	36.2 = 119	" "
" " 43,	9.8 = 32	" "	" " 54,	64.8 = 212½	" "
" " 44,	12.1 = 40	" S.	" " 55,	75.4 = 247	" "
" " 45,	31.0 = 102	" "	" " 56,	69.5 = 228	" "
" " 46,	48.7 = 160	" "	" " 57,	63.7 = 209	" "
" " 47,	47.3 = 155	" "	" " 58,	23.4 = 77	" "
" " 48,	38.3 = 125½	" "	" " 59,	11.3 = 37	" S.
" " 49,	29.4 = 96½	" "	" " 60,	46.6 = 153	" "
" " 50,	29.6 = 97	" "			

Note on the Reduction and Results of the Astronomical Observations at Lineville, Iowa.

For latitude the observed altitudes of Polaris were reduced by the method and table given on page 534 of the American Ephemeris, with the result:

Approximate latitude = 40° 34′.6.

39 Comparisons of local mean time, obtained by sextant observations of the sun, with the railroad time signals gave the following result:

Approximate longitude (W. of Greenwich) = 93° 32′.

For azimuth the observations of Polaris were reduced by the formula

$$\tan A = \frac{\sin t}{\cos \varphi \tan \delta - \sin \varphi \cos t},$$

in which the letters have the following significations:

A = the azimuth of the star at the instant of observation.
t = the hour angle " " "
δ = the declination " " "
φ = the latitude of the place.

Resulting azimuth of base line = 89° 21′ 49″ east of north.

These results transferred to the monuments at each end of this 20-mile section give the following:

	Lat.	Long.	Azimuth.
40-mile mon't	40° 34′.4	93° 51′	269° 14′ 49″
60-mile mon't	40 34 .6	93 28	89 29 40

the azimuth at each point being the bearing of the straight line joining the two points.

(Here follows Appendix C, marked p. 40.)

41 To the honorable the Supreme Court of the United States:

The account of expenses incurred in the relocation and remarking that portion of the boundary line between the States of Missouri and Iowa included from the 40th to the 60th mile point is not complete by reason of a difference of opinion regarding the proper amount of *per diem* allowance of Commissioner D. C. Morgan.

The accounts of Commissioners Harding and Dey have been made up, as regards their *per diem*, on the basis of days actually occupied by them in the prosecution of the work ordered by your honorable body in your decree of Feb. 5, 1896.

Commissioner Morgan claims *per diem* for sixty-seven (67) days' service.

Upon the basis of actual time employed, Commissioner Morgan is entitled to *per diem* for forty-six (46) days' service. Com-

42 missioner Morgan resigned as commissioner, taking effect May 1, 1896, his resignation having been forwarded to the clerk of your honorable body. His resignation was not acted upon, however, and was subsequently withdrawn.

From May 1st to May 26, inclusive, Commissioner Morgan was not employed on the work, nor was he in any way assisting therein. He claims that he resigned with the understanding that Mr. Richard P. Morgan was to be appointed in his place, and that Mr. R. P. Morgan was ready to take his place on the work at any moment, when notified by the court of his appointment. Mr. R. P. Morgan

was not appointed. Mr. D. C. Morgan subsequently withdrew his resignation and rejoined the commission at work on the boundary line May 26th. He claims that he is entitled to the 21 days from May 1st to May 25, inclusive, although during that entire time he rendered no service.

43 The question as to the proper allowance for Commissioner Morgan is one which we respectfully refer to your honorable body for decision, and with that view we have presented the facts in the matter.

We respectfully request that whatever amount may be decided upon as due Commissioner Morgan be added to account herewith. The total then found will be the total amount of expenses incurred by your commissioners in the work of relocating and remarking the boundary line between the States of Missouri and Iowa, as per the decree of your honorable body Feb. 5, 1896.

Very respectfully,

JAMES HARDING,
Comm. for Missouri.
PETER A. DEY,
Comm. for Iowa.

44 APPENDIX "B."

Account of Expenses Incident to the Relocation and Remarking the Boundary Line Between the States of Missouri and Iowa from the 40th to the 60th Mile Point, under Decree of the Supreme Court of the United States, February 5, 1896.

Pay of engineers:		
W. C. Hodgkins (U. S. Geodetic Survey corps), 74 days @ $5.00	370 00	
A. L. Baldwin (U. S. Geodetic Survey corps), 41 days @ $5.00	205 00	
Transportation from Washington, D. C.	77 75	
" to Salina, Kansas	41 14	
Freight on instruments returned to Washington	8 32	
		744 21
Pay of one assistant (14 days @ $2.50) and laborers		190 50
Subsistence of parties in field		421 75
Hire of teams and drivers and feed for teams		342 25
Paid for eighteen granite monuments in place		922 00
Miscellaneous expenses paid (telegrams, township plats, signal materials, clerical work and typewriting, repairs of instruments, storage, etc., etc.)		171 60
Advertising, Missouri and Iowa		133 30
Commissioners:		
James Harding, comm. for Missouri, 78 days @ $10.00	780 00	
James Harding, travelling expenses	161 85	
		941 85

38746

Peter A. Dey, comm. for Iowa, 60 days @ $10.00	600 00	
Peter A. Dey, travelling expenses	189 47	
		789 47
Dwight C. Morgan, comm., — days @ $10.00		
" " travelling expenses	198 63	
Total		$

I hereby certify that the foregoing account is correct and as approved by the Missouri-Iowa Boundary Line Commission at their final meeting, held in Chicago, Ill., Sept. 18, 1896.

JAMES HARDING,
Comm. for Missouri and Chairman of Board.

Endorsed on cover: Supreme Court U. S., October term, 1896. Term No., 6, original. The State of Missouri, complainant, *vs.* The State of Iowa. Report of commissioners appointed under decree of February 3, 1896, to relocate & remark portions of boundary line. Filed December 14, 1896.

Office Supreme Court, U. S.
FILED.
MAY 5 1896
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

STATE OF MISSOURI

vs.

STATE OF IOWA.

STIPULATION.

It appearing from the report of the commissioners heretofore appointed by the court to retrace and mark the boundary line between the two States parties hereto that the work cannot be completed in a satisfactory manner in the time fixed by the decree of the court, it is hereby agreed that the time may be extended until July 1, 1896, and that this agreement be presented to the court, asking that the decree heretofore rendered be so amended as to extend such time as above stated.

MILTON REMLEY,
Attorney General of Iowa, for Defendant.
R. F. WALKER,
Attorney General of Missouri, for Plaintiff.

[Endorsed:] Supreme Court U. S., October term, 1895. Term No., 10. Or'g'l. The State of Missouri, complainant, *vs.* The State of Iowa. Stipulation to extend time fixed by decree in which to retrace and mark boundary line. Filed May 5, 1896.

165-11

165-118

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 6, Original.

THE STATE OF MISSOURI, COMPLAINANT,

vs.

THE STATE OF IOWA.

STATEMENT OF DWIGHT C. MORGAN IN REGARD TO HIS COMPENSATION FOR SERVICES AS COMMISSIONER.

FILED DECEMBER 14, 1896.

1 Richard P. Morgan & Son.

Richard Price Morgan,
Civil engineer and railway expert.

Dwight C. Morgan,
Civil engineer.

DWIGHT, ILL., *November 28th*, 1896.

Supreme Court of the United States, Washington, D. C., October Term, 1895.

THE STATE OF MISSOURI, Complainant,
vs.
STATE OF IOWA. } No. 10, Original.

To the honorable court:

In the matter of my compensation for services as a member of the commission appointed herein by this honorable court, I beg leave to state that about the first of April, 1896, and soon after entering upon the discharge of my duties, I was taken seriously ill and confined to my home. Desiring to fully to discharge the duties intrusted to me, I tendered to my co-commissioners, for the time being, the services and personal presence on the work of my partner in business (my father), Richard P. Morgan. My co-commissioners telegraphed to me that the proposition was acceptable and very satisfactory.

Pursuant to this arrangement, he was present on the work until the last of April, when, as my early recovery was somewhat in doubt, the propriety of my resigning and my father receiving appointment in my place was considered and finally agreed upon, as will appear in the telegrams and the letter of Commissioner Harding, hereto attached.

2 My father waited until the fifteenth of May in readiness to enter upon the work immediately upon being notified of his appointment. Not receiving any information of it, he went to Washington and ascertained at the office of the clerk of the court that no action had been taken on my resignation, nor had any recommendation been made to the court by my co-commissioners for my father's appointment, as agreed.

My health being restored at this time, I withdrew my resignation, with the approval of Chief Justice Fuller, upon a personal presentation to him by my father of the facts.

My claim for compensation is based upon the foregoing facts, believing that under the circumstances it would be equitable for me to receive compensation for the time that my partner was awaiting the promised action of my co-commissioners. My account as presented does not include any part of the expense of my father's journey to and from Washington.

I do not wish any controversy, but I do desire that my motives

while acting as an agent of the court may be correctly understood.

With great respect, your obedient servant,

DWIGHT C. MORGAN.

The foregoing is an accurate statement.

RICH'D P. MORGAN.

3

Number.	Sent by—	Rec'd by—	Check.
1 Ex.	Ca.	F.	15, paid.

Received at 8.27 a. m., 5, 5, 1896.
Dated Pleasanton, Iowa.

To Dwight C. Morgan:

Would suggest that resignation be made direct to Supreme Court, as appointment came from them

JAMES HARDING.

4 Copy.

Form No. 2.

The Western Union Telegraph Company; Thos. T. Eckert, general manager; Norvin Green, president.

Receiver's No.	Time filed.	Check.

Send the following message subject to the terms on back hereof, which are hereby agreed to:

DWIGHT, ILL., *May 5th*, 1896.

To Gen'l James Harding, Pleasanton, Iowa:

Conforming to your suggestion, I send my resignation to Supreme Court today.

DWIGHT C. MORGAN.

☞Read the notice and agreement on back.☜

5 PLEASANTON, IOWA, *May* 5, 1896.

Dwight C. Morgan, Esq., Dwight, Ills.

D'R SIR: Your telegram of 30th ulto. was duly received, and letter of same date was not received until last night. I wired you this morning, suggesting that your resignation be tendered to Supreme Court direct. Your appointment was from the court, on recommendation of the attorneys of Mo. & Iowa, at suggestion of Mr. Dey and myself, and I presume, as appointment to fill vacancy must be made by the court, as provided in decree, that to them the

resignation should be tendered. Mr. Dey and I will recommend that your father be appointed, and I do not doubt the court will approve the recommendation.

The work has been very tedious and slow, as it has been
6 done in accordance with the precise methods of the geodetic surveys. The gross inaccuracy and utter unreliability of the Hendershott & Minor notes is very clearly demonstrated. The real trouble is yet to come, after all measurements and corrections are made. The judicial end of it will be far more difficult to adjust than the scientific.

I hope you will improve rapidly and soon be able to attend to active outdoor work. You would have enjoyed the "outing," as your father terms it, incident to this work. It has been quite interesting, and also to me very instructive.

Please give my kindest regards to your father. I hope he will be with us again before long.

Very truly yours, JAMES HARDING.

[Endorsed:] Gen'l James Harding, May 5, '96.

7 CHICAGO, *Sept.* 18*th*, 1896.

Gen'l James Harding, of Missouri; Hon. Peter A. Dey, of Iowa.

GENTLEMEN: I have expended on and in connection with the work of re-establishing the boundary line between the States of Iowa and Missouri sixty-seven days, and my claim for above services, as provided in the decree of the court, at ten dollars ($10.00) per diem, is six hundred and seventy dollars ($670.00).

Very respectfully, DWIGHT C. MORGAN.

[Endorsed:] 6, orig'l. Dec. 1st, 1896.

8 [Endorsed:] Supreme Court U. S., October term, 1896. Term No., 6, original. The State of Missouri, complainant, *vs.* The State of Iowa. Statement of Dwight C. Morgan in regard to his compensation for services as com'r. Filed Dec'r 14, 1896.